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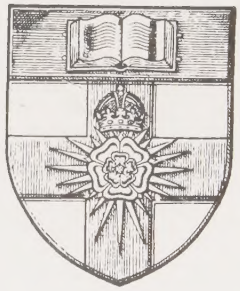

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THE

CRIMINAL APPEAL REPORTS

WITH

SUBJECT INDEX, TABLES OF CASES AND STATUTES CITED

APRIL 13, 1945, TO JULY 22, 1946

EDITED BY

T. R. FITZWALTER BUTLER,

OF THE INNER TEMPLE AND MIDLAND CIRCUIT, BARRISTER-AT-LAW, RECORDER OF NEWARK

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BEFORE

MR. JUSTICE SINGLETON, MR. JUSTICE OLIVER AND MR. JUSTICE BIRKETT.

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Evidence—Cross-Examination of Prisoner on Previous Convictions —Nature or Conduct of Defence—Imputation on Character of Crown Witness—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *s.* 1 (*f*) (*ii*).

By the Criminal Evidence Act, 1898, s. 1 (f): "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged . . . unless . . . (ii) . . . the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution . . ."

The decision in HUDSON, 7 Cr. App. R. 256, at p. 262; [1912] 2 K. B. 464, at p. 470, that the above words must receive their ordinary and natural interpretation, and that it is not legitimate to qualify them by adding or inserting the words "unnecessarily" or "unjustifiably" or "for purposes other than that of developing the defence" or other similar words remains good law, and is not affected by the proposition laid down by the House of Lords in STIRLAND *v.* DIRECTOR OF PUBLIC PROSECUTIONS (30 Cr. App. R. 40, at p. 54; [1944] A. C. 315, at p. 327), that "an accused is not to be regarded as depriving himself of the protection of the section, because the proper conduct of his defence necessitates the making of injurious reflections on the prosecutor or his witnesses".

Even where cross-examination on a prisoner's previous convictions, etc., has been rendered admissible in law by the nature or conduct of the defence, the presiding Judge still has a discretion whether to allow such cross-examination, and may disallow it on the ground that it may be fraught with results which immeasurably outweigh the result of questions put on

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behalf of the prisoner and which render a fair trial almost impossible.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on June 6, 1945, of receiving stolen property and was sentenced by the Commissioner (Judge McClure) to three years' penal servitude.

The property in question was a fur coat, which a Mrs. Austin, who knew the appellant, claimed to be hers. She stated that it disappeared from her flat during the afternoon of March 22, and that she was with the appellant in a taxi-cab the same evening, when she asked the appellant if he had taken it, but the appellant denied having done so. She said that the appellant then tried to kiss her, which she resented, and that she wished to stop the taxi-cab, whereupon the appellant said, " You jolly well won't get your coat back now ". On April 5 the appellant was seen by a police officer to alight from a taxi-cab in Edgware Road carrying a brown paper parcel. He was asked what was in the parcel, and said, " A mink coat which I have just found in the park ", pointing to Hyde Park. The parcel contained the coat which Mrs. Austin claimed to be hers. When charged the appellant said: " Yes, I should like to help you, but how can I without involving other persons? " At the trial a considerable body of evidence was called on behalf of the appellant in an endeavour to show that the coat was not Mrs. Austin's but that it belonged to someone else.

Questions were put to Mrs. Austin in cross-examination suggesting that she had spent a night with the appellant at the Mapleton Hotel and had signed a false name on the registration form, and that she had stayed at a place near Exeter with the appellant and had allowed photographs to be taken of her in the nude. When the appellant was in the witness-box, counsel for the prosecution intimated to the Judge that he desired to cross-examine the appellant on previous convictions on the ground that the suggestions put to Mrs. Austin in cross-examination were an imputation on her character within the meaning of section 1 (f) (ii) of the Criminal Evidence

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Act, 1898. The Judge, after hearing arguments, ruled that the cross-examination of the appellant on those matters was admissible on the ground indicated, and the questions were accordingly put to the appellant.

Derek Curtis Bennett, K.C., and *J. Burge*, for the appellant:

The questions in cross-examination were put primarily with the object of showing that Mrs. Austin ought not to be believed on her oath with regard to the incidents in the taxi-cab to which she had spoken. They were not directed to general credit. They were a necessary part of the conduct of the defence. That fact would not prevent the appellant from being exposed to cross-examination on his own character, if the decision in HUDSON, 7 Cr. App. R. 256; [1912] 2 K. B. 465, still remains good law and of full force. It is true that that judgment has never been expressly criticised, but it cannot be reconciled with the proposition laid down by the House of Lords in STIRLAND *v.* DIRECTOR OF PUBLIC PROSECUTIONS (30 Cr. App. R. 40, at p. 54; [1944] A. C. 315, at p. 327), where a number of authorities on this branch of the law were reviewed, and where it was stated: "An accused is not to be regarded as depriving himself of the protection of the section, because the proper conduct of his defence necessitates the making of injurious reflections on the prosecutor or his witnesses." HUDSON (*supra*), must have been impliedly overruled by that decision of the House of Lords, the language of which is directly applicable to the present case. In any event, the suggestions made to Mrs. Austin in cross-examination cannot be regarded as imputations on her character within the meaning of the sub-section, and the appellant should not have been deprived of its protection.

Anthony Hawke and *R. H. Blundell*, for the Crown, were not called to argue.

SINGLETON, J.: This is an appeal by Peter Martin Jenkins, who was convicted at the Central Criminal Court on June 6,

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on a charge of receiving a fur coat well knowing it to have been stolen. The case was heard before the learned Commissioner who after conviction of the appellant passed sentence upon him of three years' penal servitude. The appellant asked for leave to appeal upon various grounds, and this Court on July 16 gave him leave to appeal on one particular point, which is a question of law. The charge was that the appellant received the coat on some date between March 22 and April 5, well knowing that it had been stolen. The coat was the property of a Mrs. Austin, who lived at 87 Linden Gardens, Notting Hill. She knew the appellant quite well and was with him on March 21, 1945, when on leaving her flat with him she put the key under the mat by the door. She lived at the flat with another woman, and the practice of putting the key under the mat by the one who went out last had been in vogue for some little time. There was at least an opportunity for the appellant to know of that practice. She had an appointment to meet the appellant on March 22, but in fact she did not do so at the time arranged, which was lunch time. Some time around a quarter past two on that day the flat in which she and her friend lived was left with no one in it, and on her return about six o'clock in the evening she found that her fur coat had been stolen from the flat. Later that evening she went to the Queen Anne Club where she saw the appellant, and still later she was with him and another man in a taxi-cab on the way home. According to her evidence at the Central Criminal Court, she asked him again —she had asked a little earlier—about her fur coat, and said to him in the taxi-cab: "There, my coat has been taken; you are sure, Peter, you have not taken it?" She said that the other man in the taxi-cab replied: "Don't be absurd. Of course Peter has not taken it." She was asked by counsel for the prosecution: "What happened then?" and she answered: "I am afraid I had a few words with Peter. I said: 'You are sure, Peter, you did not take it?' He said: 'Of course I did not'. He pulled me over to kiss me, and I said: 'Stop the taxi immediately, I want to get out'." She said that she

got out and that he called after her: "You jolly well won't get your coat back now." She was cross-examined by Mr. Curtis Bennett and the only questions in cross-examination directed to this incident were: (Q.) "I am dealing with the last part where you say he pulled you towards him. Did you say there", that is at the police Court, "'The defendant pulled me to him and I said "Don't do that!"' (A.) I did, yes. (Q.) That is right, is it? (A.) That is correct. (Q.) Did he say: 'If you want me to find your coat, you must let me kiss you'? (A.) Something to that effect. (Q.) That is what you swore, is it not? (A.) I did. (Q.) Is it true? (A.) It is true. (Q.) You resented being kissed, did you? (A.) I did, exactly." A little later she was asked: "(Q.) You were annoyed and said you would get out? (A.) I did. (Q.) Then he screamed after you—that is what you said—'You jolly well won't get your coat back now'? (A.) That is correct."

It is quite clear that, if the jury believed that evidence, it was a very serious piece of evidence against the appellant in view of what happened later. On March 30 the appellant was seen by the police and questioned and he denied any knowledge of what had happened to the coat, though he said he knew the coat. On April 5 the appellant, according to his case, picked up a parcel by a telephone box or in between two telephone boxes just inside Hyde Park close to the Marble Arch, and he then went to some address where he had some laundry and later was seen in a taxi-cab by a shop in Edgware Road. A police officer who had been watching him said he alighted from the taxi-cab in Edgware Road still carrying the brown paper parcel. The parcel was tied up with string. The officer stopped him and told him who he was and asked: "What have you got in this parcel?", and the appellant replied: "A mink coat which I have just found in the park", and he pointed towards Hyde Park. The officer asked to be shown where he had found it and they walked towards Hyde Park, the officer in the meantime having taken the parcel from the appellant. When the officer looked inside the parcel, he found the mink coat, which was the one subsequently claimed

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by Mrs. Austin. The appellant was asked where he had found it and said: "I found it near the telephone boxes", and when asked further about it he said, according to the officer: "You cannot expect me to tell you anything more about it, can you? Give me time to think. I should like to know how you came to be over here." That last sentence was denied by the appellant, but the earlier part of the statement was agreed to by him. The same evening the appellant was charged with stealing the coat and, alternatively, with receiving it knowing it to have been stolen, and he said: "Yes, I should like to help you, but how can I without involving other persons?" When he was formally charged and cautioned, he said: "I want to think it over before saying anything more. Anyway I am innocent." When Mrs. Austin was seen by the police, she was asked for certain information with regard to the coat and her ability to identify it and she gave certain particulars before she saw the coat. When it was looked at, the things which she described were found, including some particular kind of stitching which she had done herself and some marks of make-up of some kind on the coat. Two other persons identified the coat as a coat belonging to Mrs. Austin.

When this matter was investigated before the Commissioner, a considerable body of evidence was called by and on behalf of the appellant to show, as far as it was possible to show, that this was not Mrs. Austin's coat at all but that it belonged to someone else. The appellant himself both in examination-in-chief and in cross-examination said that it was not Mrs. Austin's coat and that he knew her coat quite well; it was a darker coat and no one could mistake this for her coat. During the cross-examination indeed he said that her evidence was perjury, particularly that part of it in which she claimed that this coat was hers; that it could not be mistaken for her coat at all. Three other witnesses were called on behalf of the defence who said that this was not Mrs. Austin's coat at all, and beyond that, a Mrs. Pendarves was called, who said that the coat which was produced and which was an exhibit in the case was her coat, that it had been stolen from her house or flat on

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April 1, 1945, that is, a few days before the theft of Mrs. Austin's coat. She said that her coat was a mink coat, and that this was hers. Further a witness Gaston Bercovitz was called who said that the coat was Mrs. Pendarves' coat, although it appeared, in the case of one or two of the witnesses, there was a question as to the lining. Mrs. Pendarves when she looked closely at the coat said the lining was not hers. From what has been said it is obvious that there was a defence to this charge, and a substantial defence, to the effect that this coat was not Mrs. Austin's coat at all, but was the property of someone else, in which event the evidence of Mrs. Austin was quite useless.

But another matter arose. Mr. Curtis Bennett, as he has told this Court, realised the importance in the case of the conversation which Mrs. Austin said had taken place in the taxi-cab and at the time that she was leaving or had just left it, and, realising the importance of that, he thought it right to take a line to test that evidence. By way of cross-examination of Mrs. Austin he suggested to her that the conversation in the taxi-cab was invented by her, that it was not true at all, and a little later he said to her: "I know you say so, and I suggest that you are telling a deliberate falsehood when you say you would be resenting it if he tried to kiss you? (A.) Yes, I did resent it because I was annoyed. (Q.) I suggest that is a deliberate falsehood. You have been on very close terms of relationship with him. Have you stayed at the Mapleton Hotel with him and slept with him?" Mrs. Austin is a married woman. Her answer to that question was: "I have not slept with him, no. (Q.) Have you ever stayed at the Mapleton Hotel with him? (A.) I stayed, yes." Then the learned Commissioner asked to what this was directed, and Mr. Curtis Bennett said: "To her evidence in this case, not general credit." The witness denied that she had stayed at the Mapleton Hotel with the appellant, and Mr. Curtis Bennett then put to her a document which it was suggested was made out in part by her, a document which one is asked to sign on registering at an hotel. Mr. Curtis Bennett asked her: "Is

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the handwriting on that document yours? It is something 'G. Jenkins'. Just think about it", and she said: "The 'G. J.' is definitely my handwriting, but I cannot say the 'Jenkins' is." Then Mr. Curtis Bennett asked: "You would not put 'G. J.' and leave it, would you? That is your writing, that alleged signature. (A.) 'G. J.' is my writing. The thing was taken from me after I had written that. (Q.) Did you occupy the same room with Mr. Jenkins? (A.) I went upstairs and had a drink with him and I had an argument with him and I left the place. (Q.) There you are going with him to an hotel for the purpose of staying the night? (A.) I had no intention of staying the night. I was staying with these two friends of mine. Why should I stay there the night?" Later she was asked: "(Q.) Do you still say you were not on familiar terms—I mean familiar terms—with Mr. Jenkins before this meeting? (A.) I went up to the room he took and stayed there and had a drink with him. Then there was an argument and I left him. (Q.) You understand what I am putting these questions for—because you have said and sworn twice that when he tried to be familiar with you in that taxi you resented it and he made a statement which made it look as if he knew— (A.) I did not have anything to do with Peter Jenkins, if you want to put it that way."

Questions on that head which were put to Mrs. Austin were directed to showing that she, a married woman, had gone to the Mapleton Hotel with him to stay the night with him, and had signed a false name upon the form which had to be signed. She denied that accusation. Mr. Curtis Bennett then proceeded to ask her about certain photographs the history of which is by no means clear, but as two prints were produced by the defence and as the film was produced by the prosecution in the course of cross-examination of the appellant, it may be, though we know not, that the witness Mrs. Austin indeed had the film all the time. This question was put: "Take that envelope and look at the two photographs inside and tell me whether they are of you or a portion of you. Are they? (A.) They were taken in the country. It

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is a long time ago. So he has been to my cupboard and looked for my letters. (Q.) Answer my question, you can then explain it. Are those pictures of you? (A.) They are pictures of me. (Q.) Were those photographs not taken by Jenkins in September, 1944, in or near Exeter? (A.) Oh, how could he lie? I have never been to Exeter with him. (Q.) I said near? (A.) I can prove these are not, were not taken by Peter Jenkins. . . . (Q.) I suggest they were taken at Poll House, Ide, near Exeter in September, 1944. (A.) I have never been to Exeter", and then she added she did not know where Exeter was except that it was on the coast. Later she said: "A friend of mine took them when I was living in Cambridge." Those questions on the photographs were questions directed to showing that the witness Mrs. Austin was a woman of this type, a woman who went to a place at Exeter, stayed with the appellant, and that while there she allowed photographs to be taken of her in the nude. It is right to say that when the appellant was in the witness-box he was asked by Mr. Blundell questions as to what photographs were upon the rest of the film or spool and he said he thought he took or did take some other photographs but he could not remember what. As I have said, the film was produced by the prosecution.

Now Mr. Curtis Bennett put those questions, as he said, deliberately and after due thought. It was pointed out to him by the learned Commissioner on more than one occasion what the result might be, and the result was that when the appellant was being cross-examined by Mr. Blundell, Mr. Blundell indicated to the learned Commissioner that he desired to put to the appellant questions which would not have been admissible unless there had been something in the nature or conduct of the defence of the appellant involving an attack upon the character of the prosecutrix or of witnesses for the prosecution. Considerable argument was heard; a number of authorities were cited, and the learned Commissioner dealt with the case fully, hearing the argument upon the matter in the absence of the jury and giving his decision after the jury had

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returned into Court, so that the jury were not kept wholly in the dark as to what had been taking place. The learned Commissioner ruled that Mr. Blundell on behalf of the prosecution was entitled to put questions such as he indicated he wished to put by reason of the nature or conduct of the defence.

The question arises under section 1 of the Criminal Evidence Act, 1898, which, as we have been reminded, has been the subject-matter of argument in this Court on quite a number of occasions and in the House of Lords on at least two occasions in comparatively recent years. The matter which the House of Lords had to consider was certainly a little different. Section 1 of the Act, so far as material to this case, provides: "Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided as follows: . . . (f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless . . . (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution".

The submission of Mr. Blundell to the learned Commissioner was that the nature or conduct of the defence was such as to involve imputations on the character of the witness Mrs. Austin, who was the principal witness for the prosecution. Mr. Curtis Bennett on behalf of the appellant submitted to the learned Commissioner and also submitted to this Court that the case did not fall under those words in sub-section (f) (ii) and that there was not anything in the nature or conduct of the defence such as to involve imputations on the

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character of Mrs. Austin. He sought to argue before the learned Commissioner and in this Court that that which he did was a necessary step in order to show that Mrs. Austin's evidence of what took place in and near the taxi-cab was untrue and that it was necessary for him, in order to do that, to show that the appellant and Mrs. Austin were on terms of close familiarity, and he said: "If she had admitted that she stayed the night with him at the Mapleton Hotel, then I should not have asked her about the photographs, but as she did not admit that, I thought it right to produce to her two photographs of herself in the nude", photographs which the appellant had taken himself, so he said. The appellant, when he went into the witness-box, gave evidence that he stayed the night in March at the Mapleton Hotel with Mrs. Austin and that in the previous September he had been to Poll House, Ide, with her and had taken the photographs of her in the nude.

At once one is faced with the question whether something has been done within the words "the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution". In our opinion, the questions which were asked of Mrs. Austin, to which reference has already been made, were questions directed to show that she was a person unworthy of credit, that she was a person who ought not to be believed upon her oath; indeed, Mr. Curtis Bennett said that the purpose of asking the question with regard to the Mapleton Hotel was to show that the jury ought not to believe her with regard to the incidents of which she spoke as occurring in the taxi-cab. Both the questions with regard to the Mapleton Hotel and with regard to the photographs were, in our view, directed to showing that she was a worthless and an abandoned woman whose evidence ought not to be relied upon by the jury.

When one looks at the authorities upon this matter, one finds at once HUDSON, 7 Cr. App. R. 256; [1912] 2 K. B. 464. That case had come before a Court of three Judges, and in view of its importance the Lord Chief Justice thought it right

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to summon a Court of five Judges to sit upon it. The Judges who sat were Lord Alverstone, C.J., Bray, A. T. Lawrence, Pickford and Avory, JJ. In that case the appellant was charged with having stolen money and a bank book from the prosecutor in a public-house. The appellant and several other men were present at the time of the theft and the bank book was found in the appellant's pocket. The defence set up was that one or more of the other men had committed the theft and had put the bank book into the appellant's pocket, and when two of these men were called as witnesses for the prosecution they were asked questions by the appellant's counsel with a view to showing that they had committed the theft. The appellant was called as a witness for the defence and, without objection by his counsel, was asked questions by counsel for the prosecution as to previous convictions. It was held that the nature and conduct of the defence were such as to involve imputations upon the character of witnesses for the prosecution within section 1 (f) (ii) of the Criminal Evidence Act, 1898, and, therefore, the accused man could be cross-examined as to previous convictions. It might have been said, following Mr. Curtis Bennett's argument in this case, that it was a necessary part of the defence in that case to show that the other two persons who were there at the time had in fact stolen the wallet and that he had not. But none the less it was held by the Court of Criminal Appeal to be an attack upon the character of witnesses for the prosecution. The Lord Chief Justice, in the course of the judgment of the Court, referred to a number of authorities, which have been cited to us by Mr. Curtis Bennett to-day. He ended by saying (7 Cr. App. R. at p. 262; [1912] 2 K. B. at p. 470): "We think that the words of the section, 'unless the nature or conduct of the defence is such as to involve imputations', etc., must receive their ordinary and natural interpretation, and that it is not legitimate to qualify them by adding or inserting the words 'unnecessarily' or 'unjustifiably', or 'for purposes other than that of developing the defence', or other similar words." It is right that I should say that

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learned counsel for the appellant in the course of his argument this morning very frankly stated that if that case remained good law, he had no foundation for his submission to this Court. He was asked if there had been any criticism of the judgment in that case anywhere. He was unable to point to criticism of that judgment, but his submission was that there had been expressions in other cases which made it appear that that case was not good law to-day.

He relied for that proposition on a sentence in the speech of Lord Simon, L.C., in STIRLAND *v.* DIRECTOR OF PUBLIC PROSECUTIONS (30 Cr. App. R. 40; [1944] A. C. 315), a case decided by the House of Lords. It is important, we think, to bear in mind that that case arose upon a different part of the sub-section. In that case the appellant put his character in issue, and the point which arises for discussion in this case was not before the House of Lords for their consideration at all. So far as the report in the Criminal Appeal Reports shows, there was no reference to HUDSON (*supra*) at all, but the Lord Chancellor in the course of his speech at pp. 54 and 327 of the respective reports set out certain general propositions which, as he said, seemed to cover the ground. One of those, the fourth proposition, is this: "An accused is not to be regarded as depriving himself of the protection of the section, because the proper conduct of his defence necessitates the making of injurious reflections on the prosecutor or his witnesses." For that proposition the Lord Chancellor cited TURNER (30 Cr. App. R. 9; [1944] K. B. 463), a case of rape, which was before a Court of five Judges in the Court of Criminal Appeal in March and April, 1944. Mr. Curtis Bennett's submission was that the proper conduct of the defence of the appellant necessitated the making of injurious reflections on Mrs. Austin, and, consequently, the appellant ought not to be regarded as depriving himself of the protection of the section. It does not appear to us that the Lord Chancellor in using those words had in mind any idea of upsetting or weakening that which had been said in this Court in HUDSON

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(*supra*). If that had been the desire of the House of Lords, it would have been so stated. It is not. The House of Lords in that case had not to consider the words of the sub-section which have been discussed before us at all, and HUDSON'S CASE (*supra*), in consequence, was not referred to. Moreover, one notices that one of the learned Law Lords sitting in the case of STIRLAND (*supra*) was Lord Wright, who had been one of the Judges in this Court in POLLINGER (1930), 22 Cr. App. R. 75, in which the Court, consisting of Lord Hewart, C. J., Avory and Wright, JJ., relied upon and repeated that which was said in HUDSON'S CASE (*supra*). We cannot think that it was intended in any sense in the House of Lords in STIRLAND'S CASE (*supra*) to overrule the decision of this Court in HUDSON'S CASE (*supra*).

That is sufficient to dispose of this appeal, for Mr. Curtis Bennett told us that if HUDSON'S CASE (*supra*) stood, there was no ground for his attacking the ruling of the learned Commissioner upon this matter. We think that the position which arose did amount to an attack upon the witness for the prosecution; in other words, that the nature or conduct of the defence was such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution. Mr. Curtis Bennett submitted further that to ask a woman questions such as he asked Mrs. Austin, a married woman, was not doing something such as to involve imputations on her character within the meaning of this section. We do not see why those words should not receive their ordinary meaning, and we think that the nature and conduct of the defence was such as to involve imputations on the character of Mrs. Austin.

There is one further matter which we think it right to mention. The sub-section was intended to be a protection to an accused person. A case ought to be tried on its own facts and it has always been recognised that it is better that the jury should know nothing about an accused person's past history if that is to his discredit. Just as it was recognised by the Legislature that this was fair and proper, so it was recognised

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that if the nature or conduct of the defence was such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution, it was equally fair and proper that counsel for the prosecution should have the right to ask questions tending to show that the accused person has committed or been convicted of an offence other than that which is under investigation. If and when such a situation arises, it is open to counsel to apply to the presiding Judge that he may be allowed to take the course indicated, as was done in this case. Such an application will not always be granted, for the Judge has a discretion in the matter. He may feel that even though the position is established in law, still the putting of such questions as to the character of the accused person may be fraught with results which immeasurably outweigh the result of questions put by the defence and which make a fair trial of the accused person almost impossible. On the other hand, in the ordinary and normal case he may feel that if the credit of the prosecutor or his witnesses has been attacked, it is only fair that the jury should have before them material on which they can form their judgment whether the accused person is any more worthy to be believed than those he has attacked. It is obviously unfair that the jury should be left in the dark about an accused person's character if the conduct of his defence has attacked the character of the prosecutor or the witnesses for the prosecution within the meaning of the section. The essential thing is a fair trial and that the Legislature sought to ensure by section 1, sub-section (f).

Mr. Curtis Bennett submitted to us lastly that though the Commissioner had exercised his discretion in the matter, we ought in the circumstances to interfere with that exercise of his discretion. Learned counsel pointed out to the learned Commissioner more than once that this was a matter for his discretion, and that if he exercised it one way this Court could not be asked to interfere. If in the events that happened and in view of the nature of one question or the commencement of one question, which was not pursued, Mr. Curtis Bennett asks us now to review that decision, we

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see no ground for doing so. The learned Commissioner thought in the circumstances that these questions ought to be allowed. We see no reason whatever to differ from his decision and it follows that this appeal must be dismissed.

Appeal dismissed.

Solicitors: Smithdale, Rutledge & Co., for appellant; Solicitor to Metropolitan Police, for the Crown.

BEFORE

MR. JUSTICE WROTTESLEY, MR. JUSTICE STABLE AND MR. JUSTICE LYNSKEY.

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ROBERT CHARLES EDWIN NORMAN PERRY.

Indictment—Obtaining Credit—"Under False Pretences or by Means of Other Fraud"—One Offence Only—Not Bad for Duplicity—Particulars—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 13 (1)—*Indictments Act*, 1915 (5 & 6 *Geo.* 5, *c.* 90) *Sched. I, rule* 5, *sub-rule* (1).

By rule 5, sub-rule (1) of Sched. I to the Indictments Act, 1915, "Where an enactment constituting an offence states the offence to be the doing or the omission to do any one of any different acts in the alternative, . . . the acts, omissions . . . stated in the alternative in the enactment, may be stated in the alternative in the count charging the offence".

In view of the above rule, a count charging obtaining credit by fraud, contrary to section 13 (1) of the Debtors Act, 1869, and alleging in the particulars of offence that the accused person in incurring a debt or liability obtained credit "under false pretences or by means of other fraud" is to be regarded as charging one offence only, and is not bad for duplicity.

Observations on specifying particulars of the false pretences relied on in a count under the above section.

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Appeal against conviction.

The appellant was convicted at the County of London Sessions on June 27, 1945, on two counts of an indictment charging him with obtaining credit contrary to section 13 (1) of the Debtors Act, 1869, and on two counts charging offences under the Defence (General) Regulations, 1939. He was sentenced by the Deputy-Chairman to consecutive terms amounting in all to eighteen months' imprisonment.

Counts one and three charged the offences of obtaining credit, the particulars of offence in the respective counts being that the appellant " between February 17 and 22, 1945, in the county of London, in incurring a debt or liability to Frederick Hotels, Ltd., obtained credit to the amount of £11 13s. 11d. under false pretences or by means of other fraud " and " on April 20, 1945, in the county of Surrey, in incurring a debt or liability to Emily Helsen, obtained credit to the amount of £3 11s. 10d. under false pretences or by means of other fraud ". At the trial counsel for the defence submitted that these counts were bad for duplicity, but the submission was overruled by the Deputy-Chairman. No application was made by counsel for the defence either before or at the trial for particulars of the alleged false pretences.

Marston Garsia, for the appellant:

Counts one and three were bad for duplicity, in that each of them charged two offences in the alternative. Several Judges have objected to this form of count, and have taken the view that if obtaining credit under false pretences or by means of other fraud is to be alleged there should be separate counts to cover each limb: *Archbold's Criminal Pleading, etc.*, 30th ed., p. 1281. Further, where obtaining credit under false pretences is alleged, it is proper that particulars of the false pretences relied on by the prosecution should be given, just as they would be on an indictment for obtaining property by false pretences.

Norman Parkes, for the Crown, was not called on.

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STABLE, J.: The grounds on which the appellant rests his appeal are that the indictment is bad, first by reason of duplicity and secondly and in the alternative because the particulars of offence are, it is alleged, insufficient and inadequate. Section 13 of the Debtors Act, 1869, makes it an offence to obtain credit under false pretences or any other form of fraud. In our view, this indictment was not bad on the ground of duplicity. Each of the counts alleging offences under the Debtors Act alleged one offence and one offence alone and the matter is precisely covered, in our judgment, by rule 5 (1) of the rules of Schedule I to the Indictments Act, 1915.

As regards the second complaint, that the particulars given were inadequate, we are all agreed that they certainly are not very informative. However, no complaint on that ground was made at the trial. No suggestion was put forward that the appellant did not know perfectly well the nature of the charges which he was called on to meet, and no doubt those who were advising him did not make the application because they were not themselves in the least embarrassed. They had the depositions and they knew precisely the case which they had to meet and consequently no application for further enlightenment was made. In our view, having regard to all these circumstances, it would be entirely wrong to give effect to the argument of the appellant that because the defence did not get particulars which they did not want and for which they did not ask, a conviction which is perfectly proper on other grounds should be set aside.

In the result, this appeal fails and is dismissed.

Appeal dismissed.

Solicitors: Solicitor for Metropolitan Police, for the Crown.

BEFORE

MR. JUSTICE HILBERY, MR. JUSTICE WROTTESLEY AND MR JUSTICE STABLE.

WILLIAM RITSON MORRY.

1945.
29 *October.*

Preliminary Investigation—Prisoner's Statement after Statutory Caution—Transmission to Court of Trial—Contents of Statement—Justices' Certificate Final—Committal—Refusal to Commit on Certain Charges—Indictment—Inclusion of Counts Based on those Charges—Trial Judge to Decide whether Founded on Facts Disclosed in Depositions—Criminal Justice Act, 1925 (15 & 16 *Geo.* 5, *c.* 86), *s.* 12 (4)—*Administration of Justice (Miscellaneous Provisions) Act*, 1933 (23 & 24 *Geo.* 5, *c.* 36), *s.* 2 (2) (*i*).*

Where examining justices have taken down a prisoner's statement at the close of the case for the prosecution after giving him the statutory caution prescribed by section 12 (2) of the Criminal Justice Act, 1925, and have transmitted it to the Court of trial with the depositions according to the procedure laid down in sub-section (4), their certificate is conclusive as to the contents of the statement.

Where, therefore, the prisoner, who was a solicitor, after receiving the statutory caution had made a very long speech setting forth his defence as an advocate, and the justices' clerk had taken down a portion only of that speech, and that portion only had been read over to and signed by the prisoner, and transmitted to the Court of trial :—

Held, that the procedure of sub-section (4) was never intended to apply to such circumstances, and that the prisoner

* By section 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933 : " No bill of indictment . . . shall be preferred unless either (a) the person charged has been committed for trial for the offence ; or (b) the bill is preferred by the direction or with the consent of a Judge of the High Court. . . . Provided that (i) where the person charged has been committed for trial, the bill of indictment against him may include, either in substitution for or in addition to counts charging the offence for which he was committed, any counts founded on facts or evidence disclosed in any examination or deposition taken before a justice in his presence, being counts which may lawfully be joined in the same indictment."

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was not entitled to complain that the statement certified by the justices did not contain all that he had said.

When justices have refused to commit on any charge, the prosecution may, without leave from the Judge, include in the indictment a count relating to that charge, but if the defence object to the inclusion of that count by motion to quash it, it is for the Judge at the trial then to decide whether the count is founded on facts or evidence disclosed in any examination or deposition taken before a justice, and if he decides that it is so founded, to allow the inclusion of that count, and if he decides that it is not so founded, to disallow it.

Appeal against conviction.

The appellant was convicted at Birmingham Assizes on July 26, 1945, of fraudulent conversion, and was sentenced by Humphreys, J., to eighteen months' imprisonment.

At the preliminary investigation, in response to the question addressed to him by the justices at the close of the case for the prosecution in accordance with section 12 (2) of the Criminal Justice Act, 1925: "Do you wish to say anything in answer to the charge, etc.?" the appellant, who was a solicitor, made a speech of some three hours' length, in which as an advocate he put forward his defence. Some part, but not the whole, of this speech was taken down in writing, and read over to and signed by the appellant, and this part only was transmitted to the Court of trial under section 12 (4). The justices refused to commit on certain charges, but counts one and two in the indictment were based on those charges, the prosecution relying on the proviso to section 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, on the ground that the counts related to facts disclosed in the depositions, and no direction by or consent of a Judge of the High Court having been first obtained under that sub-section. Humphreys, J., himself raised the point whether those counts were properly included, but held that the decision of the question whether they were founded on facts disclosed in the depositions was for him, and that in the present case the counts

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were so founded and were, therefore, properly included in the indictment.

The appellant in person.

P. E. Sandlands, K.C., and *A. P. Marshall*, for the Crown.

HILBERY, J.: At his trial the appellant moved to quash the indictment, alleging that the committal was bad because the examining justices had not complied with the requirements of section 12 of the Criminal Justice Act, 1925. His contention was that the justices had sent forward with the depositions, and certified as his statement made to them, a statement which did not contain all that he said on that occasion. The trial Judge overruled that submission, holding that the justices' certificate sent forward by them to the Court of trial was final, and that the question whether it recorded fully or accurately the statement of the accused person ought not to be inquired into by him. The appellant repeats this contention in his notice of appeal and he has argued it before us.

In our view the decision of the trial Judge against this contention of the appellant that the committal was irregular and that the whole indictment should be quashed was right. Section 12 of the Criminal Justice Act, 1925, enacts a code of procedure. It lays down the procedure to be followed by examining justices where a person is charged with an indictable offence, and that procedure must be followed. It was conceded by the appellant that the justices had taken all the procedural steps required of them by the section, and the only contention was that what had been taken down before them and certified in accordance with the requirements of the section did not contain all that the appellant had actually stated. That objection does not go to establish a failure on the part of the justices to comply with the procedural requirements of the section, as was the case in GEE AND OTHERS, 25 Cr. App. R. 198; [1936] 2 K. B. 442, and PHILLIPS AND QUAYLE, 26 Cr. App. R. 200; [1939] 1 K. B. 63. It goes to establish that what they have certified to the Court of trial as a correct

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account of what has been stated is not, in truth, a correct account. The duty to see that what is sent forward correctly represents what has been stated by the accused person, or given in evidence as set out in the depositions, is a duty laid upon the examining justices. As the trial Judge said, their certificate is final as to the statement made by the accused person. It must be remembered that the accused person is in no way handicapped, because he can make any statement that he wishes to the Court and jury at his trial. He is not confined to what the justices have certified that he stated before them. In this case the appellant, as appears from the original statement certified by the justices and sent forward by them, actually signed each sheet as representing his statement, thereby approving it. He was a practising solicitor, well acquainted with the work of criminal Courts. I mention that to show that a more unmeritorious objection than that which he finally made before the trial Judge could scarcely be conceived. But the matter does not rest there. When the appellant was addressed by the justices in accordance with the procedure laid down by the section, and asked: "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing and may be given in evidence upon your trial", he knew the purpose of that question and the extent to which opportunity of making a statement should be used. He knew, too, the kind of statement which, it was contemplated, an accused person should make at that stage, but used the occasion to make a speech, lasting some three hours, as an advocate on his own behalf. He now complains that, because every word of that speech was not taken down and certified, the committal was irregular and the whole indictment should have been quashed. In our view, the procedure of calling on the accused person to make a statement, if he chooses, at that stage in the proceedings where the justices are considering whether a case is made out for committal or not was never intended to apply to a person making an oration as an advocate on his own behalf. That

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is not the time at which all the arguments should be put, nor is it intended that the statement sent forward shall be one containing all the arguments advanced as an advocate. It is only because those arguments advanced by him as an advocate were not included that the appellant, as I understand it, objects to the statement as being insufficient and not complying with the statute. The first ground of appeal, therefore, fails.

The second ground of appeal is this. On the arraignment of the appellant, who was appearing in person, the trial Judge himself raised the question whether the first two counts of the indictment could be included in it, having regard to the fact that the justices had refused to commit the appellant for trial on charges which were represented by those counts. After hearing argument, the Judge decided that the counts were properly included, but expressed his willingness to give a certificate for leave to appeal on that question. This ground raises a question on the construction of section 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933.

The material language of that sub-section is: " Subject as hereinafter provided no bill of indictment charging any person with an indictable offence shall be preferred unless either (a) the person charged has been committed for trial for the offence or (b) the bill is preferred by the direction or with the consent of a Judge of the High Court . . . provided that . . . (i) where the person charged has been committed for trial, the bill of indictment against him may include, either in substitution for or in addition to counts charging the offence for which he was committed, any counts founded on facts or evidence disclosed in any examination or deposition taken before a justice in his presence, being counts which may lawfully be joined in the same indictment." The examining justices in this case had refused to commit on the charges which were the subject of counts one and two of this indictment. Having regard to the evidence in this case, we share the learned trial Judge's inability to understand what reason they had for so refusing. The result, however, was that so far as these first two counts in the indictment were concerned the

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indictment could not be said to have been preferred under and in accordance with the requirements of section 2 (2) (a) or (b). No application had been made to the learned Judge for his consent to the inclusion of counts one and two or for his direction that they should be included, nor had the appellant been committed on those counts. Unless, therefore, counts one and two could properly be preferred by virtue of the words in paragraph (i) of the proviso to the sub-section, as far as counts one and two were concerned the indictment was bad and should have been quashed.

The difficulty which the wording of the proviso creates is that, while it provides that an indictment may include, either in substitution for or in addition to counts charging the offence for which the accused person is committed, any counts founded on facts or evidence disclosed in any examination or deposition taken before a justice in his presence, being counts which may lawfully be joined in the same indictment, it does not state who is to decide whether the counts which are added are founded on facts or evidence disclosed in the examination or depositions taken before a justice in the presence of the accused person. As the learned Judge pointed out, the Act under consideration was the Act which abolished grand juries, and the framers must have had in mind the Vexatious Indictments Act, 1859, and the amending Act known as the Criminal Law Amendment Act, 1867, and the practice which had obtained under those Acts. Omitting irrelevant words, the opening part of the Vexatious Indictments Act reads thus: "After the first day of September, 1859, no bill of indictment for any of the offences following", and then certain offences are set out, "shall be presented to or found by any grand jury, unless the prosecutor or other person presenting such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment for such

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offence, if charged to have been committed in England, be preferred by the direction or with the consent in writing of a Judge of one of the superior courts of law at Westminster", and then certain other Officers of State are named who may grant the consent. That Act gave rise to certain inconveniences, and in consequence the Criminal Law Amendment Act, 1867, was passed. Section 1 of that Act provided: "the said provisions of the said first section of the said Act"—that is the Vexatious Indictments Act—"shall not extend or be applicable to prevent the presentment to or finding by a grand jury of any bill of indictment containing a count or counts for any of the offences mentioned in the said Act, if such count or counts be such as may now be lawfully joined with the rest of such bill of indictment, and if the same count or counts be founded (in the opinion of the Court in or before which the same bill of indictment be preferred) upon the facts or evidence disclosed in any examinations or depositions taken before a justice of the peace, in the presence of the person accused or proposed to be accused by such bill of indictment, and transmitted or delivered to such court in due course of law".

Under that Act it was not necessary to obtain the opinion of the Court before including in the indictment the counts said to be founded on evidence disclosed in the depositions. Although there had been no previous committal on the particular charges which were the subject of those counts, they could be included in the indictment, but might be, and often were, objected to on a motion made to the trial Judge to quash the indictment in so far as it contained those added counts. It was then for the trial Judge to consider whether in his opinion they were founded on evidence disclosed in the depositions. In the section of the Act which we are considering, after the word "founded", the words of the older Act "in the opinion of the Court in or before which the same bill of indictment be preferred" are not to be found, but the section cannot have intended to put it in the power of the prosecution to decide finally whether the indictment against

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the accused person should include charges upon which the examining justices, the statutory Court designated by law to inquire whether those charges are *prima facie* made out, have refused to commit. That construction would enable the prosecution to overrule the decision of the magistrates. The governing words at the beginning of section 2 preclude such a view.

Where, then, rests the power to decide whether particular counts charging certain offences are properly included in an indictment as "charges founded on facts or evidence disclosed in any examination or depositions . . . being counts which may lawfully be joined in the same indictment"? The answer, in our view, is plainly with the Court before which the bill of indictment is preferred, in other words, the trial Judge. The question in its nature is one of legal objection to the indictment. It is appropriate matter for a motion to quash the indictment. The omission of the words "in the opinion of the Court in or before which the same bill of indictment be preferred", coupled with the whole structure of the section and sub-section in question, leaves no room for supposing that the opinion of the Court must be obtained in favour of the inclusion of counts which it is sought to add before adding them, nor, be it noted, are there any rules providing machinery for such a course, while there are rules for obtaining the leave of the Court to prefer an indictment where that leave is made a preliminary condition to such an indictment being preferred. The construction which we and the learned trial Judge in this case put upon the section leaves the question whether an indictment is good or bad in law, in so far as counts have been added upon which the accused person was not committed, a matter of law for decision by the trial Judge on motion made to quash the indictment in so far as such counts have been added. As it happened in this case, so it always will happen that where an accused person is not represented, if there is any doubt as to the inclusion of counts upon which there has been no committal, the trial

Judge will raise, consider and decide the question. The second ground of appeal, therefore, also fails.

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[His Lordship dealt with other grounds of appeal relating to alleged misdirection in the summing-up, and said that in the opinion of the Court there was no substance in them, and that the appeal must be dismissed.]

Appeal dismissed.

BEFORE

MR. JUSTICE HUMPHREYS, MR. JUSTICE HILBERY AND MR. JUSTICE HENN COLLINS.

THOMAS PUTLAND.
GLADYS ANNIE SORRELL.

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Emergency Legislation—Rationing—Clothing—Surrender of Coupons—Burden of Proof—Consumer Rationing (Consolidation) Order, 1944 (S. R. & O. 1944, No. 1000) arts. 2 (3), 4 (repealed and replaced by Consumer Rationing (Consolidation) Order, 1945 (S. R. & O. 1945, No. 800) arts. 2 (3), 4).

On a charge of contravening article 4 of the Consumer Rationing (Consolidation) Order, 1944 (repealed and replaced by article 4 of the Consumer Rationing (Consolidation) Order, 1945), which prohibits the acquisition of rationed goods without surrendering the appropriate number of coupons, the onus does not shift to the defendant, once the acquisition is proved, to prove surrender of coupons. The prosecution are bound to give *prima facie* evidence on which a jury would be entitled to find that there was no surrender of coupons, *e.g.*, by proving that the number of coupons which would have to have been surrendered in respect of the goods was far in excess of what the defendant would have received as his quota for the rationing period.

Appeals against conviction.

The appellants were convicted at the County of London Sessions on July 3, 1945, of conspiracy to acquire rationed

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goods, and of acquiring rationed goods, without the surrender of coupons. The appellant Sorrell was also convicted of conspiracy to supply rationed goods without the surrender of coupons. They were sentenced by the Deputy Chairman, Putland to three months' imprisonment and Sorrell to six months' imprisonment.

The case for the prosecution was that the two appellants together with a man named Marchant, who was tried and convicted with them, were watched from the Grosvenor Hotel, that they all got into a taxi-cab with a large number of packages, and that they went into a house in Cambridge Street with which none of them was in any way connected. The police followed them into the house, and in the room in which they were were 314 pairs of silk stockings, confectionery and boxes of cigars. Sorrell was standing by a parcel of 100 pairs of silk stockings which had been opened, and was examining them. Putland was merely standing in the room. Sorrell gave evidence to the effect that she was there for the purpose of collecting £180 which Marchant owed her husband, and that she had brought a suitcase for that purpose, and that several suitcases and parcels had been fetched from Marchant's lodgings. She said the silk stockings were mentioned only in this way, that someone asked her whether she knew anything about silk stockings, and that she replied: "Well, I know as much as any woman would know about silk stockings" and that she imagined she might possibly be asked to value them. Putland gave evidence to the effect that he had been asked by Sorrell's husband, who was a friend of his, to look after his wife while she was in London and that he had taken no part in any transaction.

G. O. Slade, K. C., and *Percy Lamb*, for the appellants.
R. E. Seaton, for the Crown.

HUMPHREYS, J.: Under the Defence (General) Regulations an order was made, called the Consumer Rationing (Consolidation) Order, 1944, by the Board of Trade, dealing with

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the surrender of coupons in respect of the supply of rationed goods.

Article 1 of the order made it an offence for any trader to supply rationed goods without the appropriate number of coupons being surrendered. Article 2 (3) made it an offence for any person to supply rationed goods without coupons being surrendered if he had acquired or manufactured those rationed goods for the purpose of selling them to some other person. Primarily, that sub-article relates to the manufacturer, who otherwise would not come in at all, but it may have been thought necessary to add the words: "Where a person has acquired . . . goods for the purpose of selling them to other persons he shall not supply them" without the surrender of coupons, in order to meet the possible case of a person who on one single occasion has done that. Inasmuch as it is only a trader who is otherwise forbidden to deal in rationed goods without the surrender of coupons, it might be said that a person against whom it can only be proved that it has been done once is not a trader, and so those words are put in. So much for supplying. Article 4 of the order contains this provision: "A person shall not acquire rationed goods from any person without surrendering the appropriate number of coupons". To that there is a proviso which is immaterial in this case, because it affords a possible defence to an accused person, putting the onus of proof upon that person, and no one has suggested that the defence in this case have proved or attempted to prove at any stage of the proceedings that the proviso would apply to this case.

The indictment in this case charged three persons, one of whom was called Marchant, the other two being the two appellants Mrs. Sorrell and Mr. Putland, with a conspiracy to acquire rationed goods without the appropriate number of coupons being surrendered. The second count charged all three with actually acquiring named rationed goods, that is to say 314 pairs of silk stockings, without surrendering the appropriate number of coupons. The third count charged all three persons with conspiring together to supply rationed

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goods, and inasmuch as none of them were traders and were not charged as traders, advantage was taken of the language of article 2 (3). The charge was that they had conspired together to supply rationed goods which had been acquired for the purpose of selling them to other persons. They were all convicted on counts one and two, and Marchant and Mrs. Sorrell were convicted on count three. Mr. Putland was acquitted on count three, a not unimportant matter to keep in mind, because it shows how carefully the jury discriminated in this case between the parts played by the three defendants. Marchant at one time desired to appeal against his conviction, but he abandoned that appeal and appealed only against his sentence and that appeal has been heard. The two appellants in this case have each been given leave to appeal against their convictions on the ground that questions of law worthy of consideration were proposed to be argued.

The first and most important point from the public point of view which has been raised in this case is this. It is said that there was misdirection in law by the Deputy Chairman who tried the case in regard to that very important matter, the onus of proof. Two passages are relied upon, the first being on page 15 of the transcript where a submission was being made that there was no evidence to go to the jury, and there being a submission that there was no evidence from start to finish about the surrender of coupons, or the non-surrender of coupons, the question of onus of proof was discussed. The Deputy Chairman observed that on some occasions the onus is shifted to the defendant to some extent and, the matter being argued by counsel, who said that there is nothing in the regulation which puts the onus on the defendant, the Deputy Chairman agreed with that contention. He said: "No, there is nothing in the regulations, but I think in law there is". When he came to sum up to the jury, he said this: "It has been urged by defending counsel that there is no evidence about the non-surrender of coupons. Well, there is no direct evidence, but in a case like this if you find that the defendants have acquired the goods, they must know better than anybody

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else, they may be the only persons who know, whether they have given the proper amount of coupons or not, and it is quite sufficient for the crime that they have acquired the goods, the defendants being left, if they desire, to prove that they did give the proper number of coupons. Of course, on the whole case the prosecution have to prove the case to your satisfaction, but it would not be necessary for the prosecution to prove that no coupons had been given in order to establish a case which required some answer from the defence." That is alleged to be a misdirection in law upon that matter. We were referred with regard to that matter to a decision which is binding upon us so far as it is relevant to the present case, OLIVER, 29 Cr. App. R. 137; [1944] K. B. 68. In that case the order which was being considered was the Sugar Control Order, 1940, which made it an offence for any wholesaler by way of trade to supply any sugar. It is an absolute prohibition, subject to this, that he may do so in accordance with the terms of "a licence, permit or other authority granted by the Minister". No person, therefore, may deal in sugar at all, unless he has a licence, and the Court held upon the terms of that order that the onus was on the defendant to prove that he had a licence, that being a fact peculiarly within his own knowledge, and the prosecution was therefore under no necessity of giving *prima facie* evidence of the non-existence of a licence.

There is, however, in our opinion a very broad distinction which must be observed between that case and the present. That was a case where the prohibition against doing the thing is absolute, and it is for the defendant, if he wants to show that he may do it lawfully, to provide some excuse such as a licence or other authority from the Minister. In this case the offence, and I am now dealing more particularly with the first two counts of this indictment, is not that of dealing in rationed goods either by way of supply or by way of acquiring; that remains lawful. There is no reason why anybody should not deal in rationed goods if he likes, but what is provided is that if any person in the one case, a trader in the other case, does deal in rationed goods in a particular way, he must do

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something else, and that is that he must surrender the appropriate number of coupons. That seems to us to be a slightly different matter. The view which we take of the onus of proof in such a case is this: We are not prepared to hold that the prosecution is bound to prove by evidence that in fact there was no surrender of coupons, because in many cases that would be impossible. But we are of opinion that the prosecution on a charge of having contravened this order must give some *prima facie* evidence to the jury upon which the jury would be entitled as reasonable people to find as a fact that there was no surrender of coupons. When the prosecution have done that, there is in our opinion not a change in the onus of proof, but there is a case against the defendant upon which the jury may convict him unless he can upset the *prima facie* case which has been made against him. We are very far from saying that that means that the defendant must prove in the first instance anything at all.

In the course of the argument of this case it was suggested how absurd it would be if the law were that any person who is found in possession of rationed goods which he obviously and admittedly has acquired, probably by buying them, had to prove that on buying those articles he had surrendered coupons. There would be everyday cases arising in which a servant or official of the Board of Trade might be saying to a perfectly respectable person: "Now, you are wearing a shirt which is quite new", or some other rationed goods which are quite new, "you must satisfy me that when you bought that you surrendered coupons". The answer might be, if the article in question were, say, a handkerchief or a tie, "I bought it three weeks ago somewhere or other, I cannot tell you where. I found myself without a handkerchief, I went into a shop and I gave a coupon; I cannot tell you where the shop was, and even if I did know the shop, it would not help you because it was a cash transaction; the shopkeeper has not my name, does not know me, and I do not suppose for a moment he recollects the transaction". It would be absurd to say that such a person must be convicted because he could not prove

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that he had in fact surrendered a coupon. In our view there is no necessity for a defendant in the first instance to give evidence that he has surrendered coupons, he being a person who has been proved to have acquired rationed goods, unless and until there is some *prima facie* case made against him, so that an answer is called for. Then it is for him; he can either sit down under it, or he can give evidence, make statements, do what he likes in the matter by way of satisfying the tribunal of fact that the transaction was in truth a proper one because there was a surrender of coupons. What that comes to is this, that every case must be decided upon its own facts. Therefore, when we look at the direction given to the jury in this case by the Deputy Chairman we shall decide that it was or was not a misdirection in law according to the facts of the case to which he was addressing his mind, because a summing-up is never intended to be a full statement of the law upon the subject of a particular crime which is charged in the indictment; it is a direction to the jury on the law which is to be applied by them to the facts of the case as they find them, and no more. It is always necessary for the presiding Judge to do what the learned Deputy Chairman did in this case, and that is, to warn the jury that upon the whole matter the onus is still upon the prosecution to satisfy them that the crime charged in the indictment has been committed, otherwise they must acquit.

The second point which is made is this: It is said that there was no evidence that the defendants acquired or agreed to acquire these rationed goods without coupons. Upon that matter, Mr. Seaton has drawn our attention to one fact which is so important that it may be said to be the principal fact in this case. The goods in question were silk stockings. The number of pairs of silk stockings was 314. Evidence was given that the number of coupons that would have to be surrendered for those stockings was 942. When one has evidence like that, it becomes slightly ridiculous to talk about the surrender of coupons by private persons. The jury must be taken to have known that nobody in England under this rationing system

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ever gets 300 coupons at any time, and the idea that coupons could have been surrendered to the number of 942 by these three persons was completely ridiculous. That is the best possible evidence that coupons were not surrendered, the best possible *prima facie* evidence, at all events, that they could not have been. When one looks at the evidence in the case, as the Deputy Chairman was bound to do when he was summing up, one finds that it did not consist only of proof by the prosecution that 942 coupons were apparently being dealt with, but there was the evidence of the two defendants, each of whom had purported to give an account of their doings for the whole day when they had been together, where they went, whom they saw, what they did, and from beginning to end they had never suggested that a single coupon was handed over by anybody to anybody else. In our view the Deputy Chairman was perfectly justified in making the observation which he did: "The truth is that the surrender of coupons does not come into this case at all." Nobody had ever suggested that that was the defence to this case; the defence set up in this case was: "We never acquired the goods and we never agreed to acquire the goods." If they did acquire them, in our view it goes without saying, as the phrase is, that they acquired them without the surrender of coupons.

[His Lordship then referred to the evidence and the summing-up, and said that in the opinion of the Court, while there were no grounds for interfering with the conviction of Mrs. Sorrell, it was safer that the conviction of Putland should not be allowed to stand.]

One conviction quashed.
One appeal dismissed.

Solicitors: Oswald Hickson, Collier & Co., agents for Bracher, Son & Miskin, Maidstone, for appellants; Solicitor for Metropolitan Police, for the Crown.

BEFORE

MR. JUSTICE SINGLETON, MR. JUSTICE WROTTESLEY AND MR. JUSTICE TUCKER.

RONALD HEDLEY.

1945.
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Arrest of Felon—Endeavour to Escape Arrest—Motor Car Intentionally Driven at Person Endeavouring to Effect Arrest—Verdict of Murder.

One B was endeavouring to stop a motor car in which were travelling a number of persons who had committed a felony, including the appellant who was the driver. B was killed through the car being driven against him, and the appellant was charged with the murder of B. The Judge directed the jury: "If you find that [the appellant] was the driver of the car, and you find that he intentionally ran over [B] when he could have stopped the car and submitted to arrest, and that in order to avoid arrest, instead of stopping the car, he drove over the man and so caused his death, that is murder . . ." and "If you think that in the excitement of the moment he did not realise that he was knocking down [B] and that he did not intend to knock him down, you may find that it was a case of manslaughter . . ."

Held, that the direction was correct in law.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on March 12, 1945, of murder, and was sentenced by Macnaghten, J., to death. Another person named Jenkins, who was tried with the appellant, was convicted of manslaughter and was sentenced to eight years' penal servitude.

On December 8, 1944, a jeweller's shop at 23 Birchin Lane, in the City of London, was broken into and a large quantity of jewellery was stolen. A number of persons, including the appellant and Jenkins, got into a Vauxhall car, which was also stolen, and the car was driven away towards Lombard Street. The shopkeeper came to his door and blew a police

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whistle and a number of people shouted: "Stop them!", "Stop that car!", etc. In Lombard Street a naval officer, Captain Binney, went across the road and stood in front of the car, which was travelling at a slow pace, and he put up his hands as an indication for the car to stop. The car appeared to stop, but to start again, and Captain Binney was knocked down by the car and dragged underneath it for a considerable distance. His body was eventually found in Bermondsey Lane, about a mile from Birchin Lane. He died the same afternoon from multiple injuries.

Eric Neve, K.C., and *H. Fenton*, for the appellant.
L. A. Byrne, for the Crown.

SINGLETON, J.: [After stating the facts, and stating that in the opinion of the Court there was no substance in any of the alleged misdirections on fact on which the appellant's counsel had relied.] The next complaint made on behalf of the appellant is that the learned Judge, both during discussion during the trial and also in the course of his summing-up, appeared to usurp the functions of the jury. One of the passages of which Mr. Neve complained is in these words: "That, of course, is a question of fact for you, but the evidence seemed overwhelming that there was ample opportunity for the driver to stop before he reached Captain Binney." A Judge when directing a jury is clearly entitled to express his opinion on the facts of the case provided that he leaves the issues of fact to the jury to determine. The question was left to the jury. The learned Judge told them: "It is the function of the jury to find the facts, and it is the function of the Judge to tell the jury the law", and later, "The question you have there to make up your minds about is: did the driver of the car intentionally knock down Captain Binney and drive over his body? Did he do it intentionally, or was it, as Mr. Fenton has contended before you, and as Jenkins is alleged to have said to Detective-Constable Hart, a pure accident, that the officer did not give the driver a chance?

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Now, that is a question of fact for you. If he knocked him down intentionally and drove over him and he died, I have to tell you that by our law that is the crime of murder."

The learned Judge made it clear that it was for the jury to determine the facts of the case, and later he said to them: "You have got to make up your minds whether the driver, assuming Hedley to be the driver, knocked down Captain Binney intentionally. If he did, my direction to you is that by the law of England he committed the crime of murder." That, as a direction of law, was not challenged by Mr. Neve, and could not be, for it is the law of this country correctly stated. Later in the summing-up the learned Judge put to the jury the argument of Mr. Fenton on behalf of the prisoner in these words: "Mr. Fenton, on behalf of Hedley, put forward a plea much the same as Jenkins is alleged to have said to Detective-Constable Hart, that Captain Binney did not give the driver a chance, that he got in front of the car so suddenly that it was, in the words attributed by Detective-Constable Hart to Jenkins, a pure accident. If it was a pure accident, if it was a case like the case of a child suddenly rushing out from the side of the road where a man was driving a vehicle with all possible care, then of course your verdict should be Not Guilty, even although you were satisfied that he was the driver of the car. That, of course, is a question of fact for you." Then followed the passage which I have read, "but the evidence seemed overwhelming", etc. The learned Judge went on to define the crime of manslaughter, and said: "Manslaughter is the unlawful killing of a human being, and where a person by his driving of a motor vehicle, which is of course a dangerous vehicle, conducts himself recklessly so as to show a disregard of human life . . . it is open to [the jury] to find him guilty of the crime of manslaughter. Of course [the appellant] had no intention of killing Captain Binney; it would seem that all he wanted to do was to get away with the stolen goods. If you think that in the excitement of the moment he did not realise that he was knocking down Captain Binney and that he did not intend to knock

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him down, you may find that it was a case of manslaughter, because where the charge is murder, the jury, if they think the circumstances of the case justify them in coming to that conclusion, may return a verdict of Not Guilty of murder, but Guilty of manslaughter." Again in that passage the learned Judge points out to the jury that the question of fact is for them, and that unless they find that there was an intentional knocking down of Captain Binney they ought not to convict of murder, but that they could properly convict of manslaughter, if it seemed to them that in the excitement of the moment the driver of the car did not realise that he was knocking Captain Binney down and that he did not intend to knock him down.

In his summing-up the learned Judge pointed out the three verdicts which were open to the jury, Guilty of murder, or Guilty of manslaughter, or Not Guilty. The third possibility was not put forward as arguable in this Court, so that it may well be said that in that regard the summing-up was more favourable to the accused person than it might have been. On at least ten occasions during his summing-up the learned Judge pointed out to the jury that before they could convict the prisoner of murder they must be satisfied that the knocking down of Captain Binney was done intentionally. Towards the end of the summing-up the learned Judge said: "I will state once again the direction I give you in law. If you find that Hedley was the driver of the car, and you find that he intentionally ran over Captain Binney when he could have stopped the car and submitted to arrest, and that in order to avoid arrest, instead of stopping the car, he drove over the man and so caused his death, that is murder by the law of England." Mr. Byrne, in his submission to this Court, submitted that on the facts proved, the verdict of Guilty of murder was the only proper or only possible verdict. It is unnecessary to say more than that the matter was one for the jury, and that the proper question was put to them. Captain Binney, an officer in His Majesty's Navy, was courageously performing a duty of a kind with which any citizen may be faced. He was seeking to stop,

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or to secure the arrest of, persons who had just then committed a felony and who were endeavouring to escape with the proceeds of their crime. He was killed through a motor car being driven against and on to him by the appellant, who was one of the felons. The jury, by their verdict after the direction given to them, must have found that the driving of the car against Captain Binney was intentional. They found the case proved; in the words used by Mr. Byrne in his opening, they found that that was done by the man who was driving the car because he did not desire to be arrested, because he was intent on resisting arrest with violence. They found that the car was driven deliberately at Captain Binney. That being so, the case is most clearly one of murder. The appeal is dismissed.

Appeal dismissed.

BEFORE

MR. JUSTICE WROTTESLEY, MR. JUSTICE STABLE AND MR. JUSTICE LYNSKEY.

PETER JOSEPH JARMAIN.

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Murder—Act Done During Commission of Felony Involving Violence —Violent Measures Resulting Inadvertently in Death—Loaded Firearm Pointed to Frighten.

A person who uses violent measures in the commission of a felony involving personal violence does so at his own risk and is guilty of murder if those violent measures result even inadvertently in the death of the victim. For this purpose, the use of a loaded firearm in order to frighten the victim into submission is a violent measure.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court

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on September 25, 1945, of murder and was sentenced by Charles, J., to death.

The appellant had purchased an automatic pistol with the object of using it to facilitate the commission of a robbery. On June 26 he went to a particular garage, intending to hold up the proprietor and rob him. When he entered, he did not find the proprietor, but found a Mrs. Phillips counting the day's takings. According to the appellant's own evidence, he demanded a pile of notes lying in front of her, which she refused to hand over; he then changed the pistol from his right to his left hand, and cocked it twice, so introducing a live round into the breech. He kept the pistol pointed at her with his finger on the trigger which, he said, he must have inadvertently pressed. The pistol went off and the woman fell down shot, and died later. The appellant grabbed a pile of notes and ran out.

The material passages of the summing-up appear fully in the judgment.

F. H. Lawton, for the appellant:

The summing-up was defective, in that the Judge confused inadvertence on the part of the appellant as to the possible results of his action with inadvertently doing the material act, namely firing the pistol. The appellant was not guilty of murder unless he pressed the trigger voluntarily, and if his will did not go with the action of his finger, he was guilty of manslaughter only, and the jury should have been so directed. [He referred to WOOLMINGTON *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 25 Cr. App. R. 72, at p. 95; [1935] A. C. 462, at p. 482, and DIRECTOR OF PUBLIC PROSECUTIONS *v.* BEARD, 14 Cr. App. R. 159, at p. 187; [1920] A. C. 479, at p. 493.] In BEARD'S CASE (*supra*), it is stated: "The evidence established that the prisoner killed the child by an act of violence done in the course of or in the furtherance of the crime of rape, a felony involving violence. The Court held that by the law of England such an act was murder . . . There can be no doubt as to [the] soundness [of that view

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of the law].” While the authority of that passage must be fully accepted, it should, it is submitted, be read as if the word “ intentional ” or “ voluntary ” occurred before the words “ act of violence ”, and it is not intended to deal with a case where the act of violence was involuntary or accidental. Where death is due to a violent act, which was inadvertent or involuntary, the mere fact that the general design was that of a felony involving violence does not render a killing which occurs in the course of it murder.

L. A. Byrne, for the Crown:

In the present case the direction given by the Judge followed that given in LARKIN, 29 Cr. App. R. 18; [1943] K. B. 163. Further, it followed the decision of the Court of Criminal Appeal in BEARD'S CASE (*supra*) on that point, which was approved by the House of Lords, though their decision on the other issue in the case—namely the law relating to drunkenness—was reversed. It was argued on behalf of the appellant in the Court of Criminal Appeal in that case that the Judge should have told the jury that if they were of opinion that the violent act, which was the immediate cause of death, namely strangulation, was not intentional, but the accidental consequence of the appellant placing his hand over the child's mouth to prevent her screaming, the verdict should be manslaughter. The House of Lords held that that argument was bad in law. The argument on behalf of the appellant in the present case is in substance the same and cannot be supported in view of the authorities.

The Court, on the conclusion of the arguments, announced that the appeal would be dismissed and that they would give their reasons at a later date.

October 22.—The following judgment of the Court was read:

WROTTESLEY, J.: The appellant was convicted at the Central Criminal Court before Charles, J., of the murder of Ivy May Phillips. He was sentenced to death and now applies for leave to appeal against the conviction. The Court, having

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treated the application as the appeal and heard counsel for the appellant and the Crown, dismissed the appeal and decided to give the reasons for their decision later.

I will now give those reasons. The facts, in so far as they are relevant to the subject-matter of the appeal, are quite simple and are not in dispute. The appellant, having purchased an automatic pistol, with the object of using it in order to commit armed robbery, inquired from a friend as to the business routine at a particular garage and finally decided to hold up the owner of it and to rob him. Accordingly, on June 28, between 5.30 and 6 p.m. he entered the garage expecting to find and hold up Mr. Booth, the proprietor. In fact, he found Mrs. Ivy May Phillips counting the day's takings. As no one but the appellant has survived who knows exactly what happened then, I will read his account of it. " She saw the gun. In front of her were two piles of silver on top of some notes." The appellant said to the dead woman: " I'll have that, sister "; she said: " Don't be silly." The appellant, who up to then had the gun in his right hand pointing at her, now changed it over to his left hand and cocked it twice, thus allowing one live round to be ejected, saying: " This ain't no toy ", hoping to frighten her. She said: " Don't be absurd." She was apparently a brave woman, and in addition may well have refused to believe that in 1945 at Thornton Heath she was likely to be shot by a casual visitor just because she refused to hand over her employer's money. The appellant said no more, but kept the pistol in his left hand pointed at the woman and with his finger on the trigger. When he had cocked it for the second time he had introduced a live round into the breech. Then, according to his account, he must inadvertently have pressed the trigger, for the pistol went off. The woman fell shot, and as she fell the appellant realised he had shot the woman and turned round and grabbed a pile of notes and ran out. After two operations, the woman died of the wound inflicted.

Dealing with this account of the killing of Mrs. Phillips, which the jury may or may not have believed, but which they

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were bound to consider as being possibly the truth, the learned Judge told the jury in three passages what was the law and what was their duty. He said: "It has been laid down many times by myself and other Judges, and as recently as three years ago, that where an act upon which a person is engaged in performing is unlawful, then if at the same time it is a dangerous act, that is, an act which is likely to injure another person and quite inadvertently the doer of that act causes the death of another person, then he is guilty of manslaughter. Now, that is if the act is unlawful; but if, in doing that same dangerous and unlawful act, he is doing an act which amounts to a felony, he is guilty of murder and not manslaughter. Such are the general terms of the law. Let me apply them, if I may, to the circumstances of this case. This man was, by all admissions, by his own sworn testimony, engaged upon an armed robbery, and that is a felony and nothing but a felony, and in the course of that armed felony this unfortunate young woman met her death at his hands. You have been invited to say that there was a sort of break, that is to say, that when this woman refused to be cowed by the exhibition of this loaded and cocked revolver, this man was so bewildered with her bravery that he forgot and set aside the execution of the felony for which he had entered the garage, and that while momentarily, almost, he was in that condition of mind he inadvertently, he knows not how, squeezed the trigger and killed the woman, or injured her so that she died a little time afterwards. Now, I find it very difficult in directing you that you can consider any such proposition."

In addition, he said: "and so it is that, upon the testimony before you in this case, it is my bounden duty (and do not think that these duties are not painful) to tell you that he went to execute an armed robbery, which is a felony, and that in the execution of that armed robbery, which he carried out to its absolute completion by taking the money which he went there to get with the assistance of the revolver, in doing that, he was doing that which was a dangerous act or an

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unlawful act, holding a loaded cocked revolver with his finger on the trigger in the direction of that woman while he was executing a felony and as part of it. It may well be that he did not intend or desire that revolver to go off. I have to tell you in law that that does not make any difference; if you accept the circumstances under which this terrible killing took place, that is murder, plain, stark murder".

Finally he ended by saying: "You will remember the statement that he made, but the statement does not vary from that which he said". (That is to say at the trial.) "He simply says that he passed the revolver from his right hand to his left hand; he knew it was cocked, he knew it was loaded, and he held it in his left hand pointing as he knew, and says he knew, towards the woman, and that it went off inadvertently; and if all that be true, then I am bound to direct you that that is murder and not manslaughter."

On behalf of the appellant it is said here that these passages were a misdirection and that the Judge confused inadvertence as to what the results of his action might be with inadvertently doing the very act itself, but in its simplest form the careful and clear argument of Mr. Lawton amounted to this, that in order to render himself guilty of murder the appellant must have pressed the trigger voluntarily and not inadvertently, and so fired the pistol. If, therefore, the jury accepted his evidence that his will did not go with the action of his finger in pressing the trigger he was (according to Mr. Lawton's argument) guilty not of murder but manslaughter, and he contended that the jury should have been so directed. In the absence of more specific authority he based his argument upon two passages. The first passage is to be found in WOOLMINGTON *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 25 Cr. App. R. 72, at p. 95; [1935] A. C. 462, at p. 482, where Lord Sankey, L.C., said: "When dealing with a murder case, the Crown must prove (a) death as the result of a voluntary act of the accused and (b) malice of the accused." In that case the only issue before the House of Lords was the burden of proof. There was no question of a felony with

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violence; at the highest the alleged facts showed only a misdemeanour. The second passage is from the speech of Lord Birkenhead, L.C., in the case of DIRECTOR OF PUBLIC PROSECUTIONS *v.* BEARD, 14 Cr. App. R. 159, at p. 187; [1920] A. C. 479, at p. 493. This is the passage: "The first objection failed, the Court being of opinion (apart from the defence of drunkenness) that the evidence established that the prisoner killed the child by an act of violence done in the course or in the furtherance of the crime of rape, a felony involving violence. The Court held that by the law of England such an act was murder. No attempt has been made in your Lordships' House to displace this view of the law and there can be no doubt as to its soundness." It was argued on behalf of the present appellant that this passage must be read with the addition of the word "intentional" or "voluntary" before the words "act of violence". Accordingly, counsel for the appellant claims that if the appellant's evidence is accepted, while it is true that he was engaged in the commission of a crime involving violence, the death of the woman killed was not due to a voluntary violent act performed by the appellant, but to an inadvertent and involuntary act, and the mere fact that the general design was the completion of a crime involving violence was not sufficient to make the killing, which occurred in the course of it, murder.

On the other hand, Mr. Byrne, for the Crown, pointed out that the direction given by the learned Judge in this case was practically verbatim the law as laid down in this Court in LARKIN, 29 Cr. App. R. 18; [1943] K. B. 163. The question, therefore, arises whether the fact that the firing of the pistol was or might have been inadvertent creates an exception to the general rule laid down in that case, based as it is on a long line of precedent. In the case of BEARD (*supra*), Lord Birkenhead pointed out that in the Court of Criminal Appeal two separate and independent points of misdirection had been raised on behalf of the prisoner. The first was that the learned Judge should have told the jury that if they were of opinion that the violent act, which was the

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immediate cause of death, was not intentional but was an accidental consequence of placing his hand over the mouth of the deceased so as to prevent her screaming, they could and should return a verdict of manslaughter. As the Lord Chancellor pointed out, that objection failed; and it is clear that the House of Lords approved of the decision of the Court of Criminal Appeal in rejecting that objection. As Mr. Byrne pointed out, if the Court of Criminal Appeal were right in that decision, they decided that which is in principle indistinguishable from that which arises in this case. In effect, the argument for the appellant here rests on the proposition that you must isolate the pressure of the appellant's finger on the trigger of the pistol from all the surrounding acts and circumstances which made it a deadly thing to do. The act in the performance of which the appellant killed the dead woman was robbery with arms, which was compounded of many elements and circumstances. The pistol must be loaded, cocked and presented at the woman as well as fired in order that her death might result, and it was admitted that all these elements were present and that all but the last were brought about by his voluntary act. Even if the pistol had never been fired, it is clear that the appellant committed upon this woman a felony involving violence; he even completed the robbery.

The Judge was no more under a duty to direct the jury that if the pressing of the trigger was inadvertent the killing was manslaughter than was the Judge in the case of BEARD (*supra*) under a duty to direct the jury that if the pressure exerted by the appellant in that case voluntarily was only so much as was necessary to silence the child and the extra pressure which throttled her was inadvertent and accidental, that the accused there was guilty of manslaughter.

We think that the object and scope of this branch of the law is at least this, that he who uses violent measures in the commission of a felony involving personal violence, does so at his own risk and is guilty of murder if those violent measures result inadvertently in the death of the victim.

For this purpose, the use of a loaded firearm in order to frighten the person victimised into submission is a violent measure. The recent case of HULTON AND JONES, decided in this Court (1944), unreported, is clear authority for this proposition.

Appeal dismissed.

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BEFORE

MR. JUSTICE WROTTESLEY, MR JUSTICE STABLE AND MR. JUSTICE LYNSKEY.

ANNIE SELLARS.

1945. 22 *October.*

Emergency Legislation—Rationing of Clothing—Acquiring—Defence Provided by Order—Direction to Jury—Consumer Rationing (Consolidation) Order, 1944 (*S. R. & O.* 1944, *No.* 800), *articles* 3, 4 (*revoked and replaced by Consumer Rationing (Consolidation) Order*, 1945 (*S. R. & O.* 1945, *No.* 1000), *articles* 3, 4).

By article 4 of the Consumer Rationing (Consolidation) Order, 1944 (revoked and replaced by article 4 of the Consumer Rationing (Consolidation) Order, 1945): "A person shall not acquire rationed goods from any person without surrendering the appropriate number of coupons in respect thereof: provided that it shall be a defence to a person charged with contravening this provision to prove that the supply to him of those goods without the surrender of coupons was not prohibited under the provisions of this Order."

On a charge of contravention of article 4, a jury should be directed that a defendant can discharge the burden of proof intentionally shifted on to him by proving an acquisition which, on examination, is found not to be prohibited by any of the provisions of the Order, even though the defendant may not be able to do so without establishing that the sale was by a person who was not a trader.

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Appeal against conviction.

The appellant was convicted at the Central Criminal Court on July 25, 1945, of acquiring rationed goods without surrendering coupons, and was ordered by the Common Serjeant (Judge Beazley) to be bound over for three years.

The clothing in question was stolen during Whitsun weekend, 1945, by thieves who broke into a store at 78–81 Goswell Road. On Whit Tuesday the police visited a flat where one Ada Breen, who was charged together with the appellant, lived, and found in her room a quantity of clothing, which was of all kinds, but all women's clothing. They then went to another flat on a different floor in the same building and saw the appellant, and asked her about the property. She said: "Don't tell me it is stolen. I have some clothing here for my children, what the girl Breen gave me", and produced an overcoat and told them that they would find the rest in the drawers, adding that she had not yet paid for them. A little later she made a statement to the effect that Margaret Breen had offered her the clothing that morning, assuring her that it was "straight" and that she could pick what she wanted for her children. The appellant said that she had taken the bundle, but had not had time to make her choice before the police arrived, and had not paid for anything.

Venetia J. M. Stephenson, for the appellant.
Sebag Shaw, for the Crown.

WROTTESLEY, J.: In this case the appellant was convicted at the Central Criminal Court of acquiring rationed goods without surrendering coupons, and she was bound over for three years. She now appeals against conviction. Her ground of appeal is that the Common Serjeant was wrong in law in holding that acquisition from a private individual for the private use of the acquirer without the surrender of coupons was a breach of the Consumer Rationing (Consolidation) Order, 1944, Part 1, arts. 3 and 4. Counsel for the appellant

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submitted that the order did not apply, and that is the point which has really been argued here to-day.

The case is capable of being dealt with quite shortly, and for this reason: This order is no longer in force, though I am told it has been replaced by another one. It deals with "supply of rationed goods by traders", and article 1 provides: "Subject to the following provisions of this Part of this Order, no trader shall supply any rationed goods to any person unless the appropriate number of coupons has been surrendered to the trader in respect thereof." "Trader" is defined in the definition article, art. 56, as follows: "a person carrying on in the United Kingdom the business of supplying any rationed goods, whether or not he carries out any process in the manufacture of them, or a business in the course of which he uses rationed goods in the production of goods which are not rationed goods"; and there is a sub-division in the same definition section defining "registered trader" and "unregistered trader", which is not necessary for the purposes of this case. Article 2 (I am only dealing with the more important and relevant provisions) deals first of all with the case "Where any rationed goods are sold at a public auction on behalf of a person who is not a trader, the auctioneer shall not permit the supply of those goods unless the appropriate number of coupons has been surrendered to him". There is a similar provision with regard to sale at a bazaar or sale of work. Then art. 2 (3) provides: "Where a person has acquired or manufactured rationed goods for the purpose of selling them to other persons, he shall not supply them unless the appropriate number of coupons has been surrendered to him." That covers the case of somebody who buys material, works it up into a dress and sells the dress. Then comes art. 4, which is the important one for the purposes of this case, and which is quite general. It says: "A person shall not acquire rationed goods from any person without surrendering the appropriate number of coupons in respect thereof: provided that it shall be a defence to a person charged with contravening this provision to prove that the supply to him of those

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goods without the surrender of coupons was not prohibited under the provisions of this order."

It is clear to us, first of all, that this position is brought about by this article, that a person who does acquire rationed goods must, if charged with an offence against this order, in order to be found not guilty, prove that the supply was something which was not prohibited by this order. The burden of proof is shifted intentionally by the order on to the person accused, but we are all agreed that that onus is discharged by proving a set of facts which, on examination, is found not to be prohibited by any of the provisions of the order. It may well be that the defendant could not do that without establishing that the sale was by a person who is not a trader, but we are not concerned with that. We are all clear that that is the proper approach to this matter, and that is a proposition which the prosecution contest in this case. It has been contested quite properly, but we hold the view strongly that the proper approach to that question is to prove a set of facts and then from them to establish, if possible, that that is a set of facts not prohibited. It is not necessary to go further than that.

There are two passages in the summing-up of the learned Common Serjeant on this matter of which complaint is made. In the first he said, when dealing with this charge, after reading article 4: "There are certain provisions of the order which say that coupons are not necessary. I need not go into them at any length, but it is really that I may deal with the point very neatly and ably raised by Miss Stephenson yesterday when she said that in the circumstances of this case it could not be said that these goods were acquired. Paragraph 4, as I have pointed out, contains an absolute prohibition of acquiring rationed goods from any person without surrendering the appropriate number of coupons unless the order in some other part of it states that coupons are not necessary." That is not the effect of article 4, and Mr. Sebag Shaw quite fairly in the course of his argument told us that the distinction between what the learned Common Serjeant

said at this point in his summing-up and the real meaning of article 4 is not to be reconciled, and therefore it is clear that in that respect the summing-up did not give the true meaning of this order.

There is another passage where he said: "Then as regards Mrs. Sellars the same thing applies. Consider her story. If you consider it a reasonable one and one consistent with innocence, acquit her of receiving, but I cannot see at the moment any answer to the question of acquiring. In my view she did acquire these goods in accordance with the terms of that order and I am bound so to direct you." It is, therefore, quite clear that there again the learned Common Serjeant directed the jury that they had no choice in this matter, whereas in truth and in fact it was necessary that the jury should have before them the facts as alleged, together with the necessary guidance on the one hand as to what they must find in order to find her guilty of a breach of this order and, on the other hand, as to all the facts which they must find to find her not guilty. As the jury did not receive that assistance, this conviction cannot stand and must be quashed.

Conviction quashed.

BEFORE

MR. JUSTICE HUMPHREYS, MR. JUSTICE LEWIS AND MR. JUSTICE HENN COLLINS.

1946.
15 *January.*

ALLEN JOHN KNIGHT.
JOHN VICTOR THOMPSON.

Evidence—Voluntary Confession Admitting Offences Charged and Other Offences—Whole of Confession Read to Jury—Convictions Quashed.

The appellants on being arrested each made a voluntary confession admitting not only the offence charged, but also a series of other offences. Neither had put his character in issue. The prosecution desired that the statements should not be read *in toto* before the jury, but the Chairman ruled that they should be read.

Held, that the portions of the statements which related to other offences ought not to have been read, and that the convictions must be quashed.

Appeals against conviction.

The appellants were convicted at Surrey Quarter Sessions on November 7, 1945, of driving away a motor car without the owner's consent, and were each sentenced by the Chairman to three years' detention in a Borstal institution.

On arrest each of the appellants made a voluntary statement, in which he admitted not only the offence charged in the indictment, but also a series of other offences. Counsel for the prosecution proposed to put in evidence only those portions of the statements which related to the offence charged, but the Chairman ruled that the statements should be read *in toto*.

Frank Cassels, for the appellants:

Although the statements were in the nature of voluntary confessions, neither of the appellants had put his character in issue, and the parts of the statements which related to other

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offences committed by them were highly prejudicial to a fair trial and ought not to have been admitted in evidence.

H. J. Hamblen, for the Crown:

The prosecution agrees that only the parts of the statements which related to the offence charged should have been read to the jury, and endeavoured at the trial to secure that the rest should be excluded, but the Chairman took a contrary view.

LEWIS, J.: These two appellants appeal against their convictions at the Surrey Sessions in November, 1945, for driving away a motor car without the owner's consent.

The only issue in the case was whether or not Mr. O'Brien, who was the owner of the car, had given his consent or, as the statute says, whether or not these two appellants honestly believed that they had authority. The only evidence material to that issue was the evidence of O'Brien, who said that he had never given consent, and on the other hand the evidence of the two appellants, one of whom said "I thought I had consent" and told his companion, who said that he believed that consent had been obtained.

In the course of the case two statements taken by the police, one from each of the two appellants, were read. In those statements each of the appellants admitted that he not only had gone out on the particular night in the car obviously to commit crime—they had stolen things from stationary motor cycles and then when they met the police officer took them back again—but also that on previous occasions he had committed two felonies, one three months earlier. The second appellant further admitted that he was guilty of possessing a gun without a firearms certificate, and he also related how on the particular night they had gone round together obviously searching for things to pick up from other cars.

This Court is of opinion that those statements should not have been admitted and read before the jury. Mr. Hamblen, who appeared for the prosecution—the appellants not being

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represented—drew the attention of the learned Chairman to the fact that in his view the statements were not relevant and did his best to prevent their being read *in toto*, but the learned Chairman thought they were relevant and allowed them to be read. The effect of that was that the jury had before them the fact that the two appellants, whose characters were not in issue, had been guilty of other crimes. That was contrary to the rules of evidence, and in this case was a matter of considerable importance because the question whether or not they were guilty of the offence with which they were charged depended solely on their evidence on the one hand and the evidence of Mr. O'Brien on the other. No such charges were made, and no doubt could not have been made, against Mr. O'Brien; but the position was that the jury, having heard the records of the two appellants on their own confession, would be inclined to say: "Here is a story told by two men who are self-confessed criminals, and here on the other hand is Mr. O'Brien, a perfectly respectable, honest man; we prefer to believe him", which would be quite natural. We think that this trial was unsatisfactory in that those parts of the statements which admitted that they had committed other offences were allowed to be put before the jury. Mr. Cassels is right, in our view, in submitting that this was a case in which evidence was wrongly admitted, and therefore the only course this Court can adopt is to quash these convictions, and they are accordingly quashed.

Convictions quashed.

BEFORE

MR. JUSTICE HUMPHREYS, MR. JUSTICE LEWIS AND MR. JUSTICE HENN COLLINS.

HENRIETTA BINNS.

1946.
16 *January.*

Sentence—Homicidal Maniac—Observations on Powers of Court.

Observations on sentence in the case of homicidal maniac who was fit to plead.

Application for leave to appeal against sentence.

The applicant was convicted at Leeds Assizes on November 23, 1945, of wounding with intent to do grievous bodily harm and was sentenced by Lynskey, J., to four years' penal servitude.

No counsel appeared on either side.

HENN COLLINS, J.: This is a lamentable case, because it is quite clear that the applicant is a homicidal maniac, but the prison doctor, seeing that she was in his opinion fit to plead, could not certify her. In those circumstances the Court had no alternative to passing the sentence appropriate to the crime of which she was convicted on her own confession. The only thing which can be done, and which will be done, is to call the attention of the Home Office to the matter and invite their special attention to her condition with a view to getting her certified. We can do nothing with regard to the sentence and do not propose to grant leave to appeal.

HUMPHREYS, J.: In addition to what my brother Henn Collins has said, I observe that this is yet another case similar to at least two which have been before this Court recently, where a person who is in fact a lunatic and certifiable as such is brought up and charged on indictment with a crime. That person has acuteness enough to realise that, if she sets up the

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defence of insanity which would certainly be accepted by the jury, she would go to a criminal lunatic asylum, but that if she pleads guilty to the crime the Court has no power to make any such order, and she will go to prison for a comparatively short time—a time much shorter than the period for which she would be kept in a criminal lunatic asylum. She therefore pleads guilty, and so the Court has no power to do what everyone must agree it ought to have power to do, that is, to send her to a criminal lunatic asylum, which is the only place where she can properly be kept.

That is what has happened in this case. It has happened twice before. This Court has drawn the attention of the authorities to the matter and has suggested that this is a case where the state of the law is in urgent need of alteration. This wretched woman is not responsible for her actions according to our law. The medical officer, an independent witness, says that she is a dangerous homicidal lunatic, and yet the only thing the Court can do is to say that she must go to prison like any other person who has broken the law. As my brother has said, we cannot interfere with that sentence because we have no more power than the Court of first instance had to do anything except to treat her as a person who is sane.

Application refused.

IN THE HOUSE OF LORDS.

BEFORE

THE LORD CHANCELLOR (LORD JOWITT), LORD MACMILLAN, LORD WRIGHT, LORD PORTER AND LORD SIMONDS.

WILLIAM JOYCE *v.*
DIRECTOR OF PUBLIC PROSECUTIONS
(*on behalf of His Majesty*).

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Treason — Allegiance — Alien Formerly Resident in Realm — Protection of Crown—Possession of British Passport—Treason Act, 1351 (25 *Edw.* 3, *st.* 5, *c.* 2).

An alien who has been resident in but has left the realm may be convicted of high treason in respect of an act done by him outside the realm if at the time of the commission of the act he was still enjoying such protection from the Crown as to require of him continuance of his allegiance. The possession of a British passport affords such protection.

The appellant, who was an American citizen, was born in the United States in 1906, came to Ireland in 1909 and remained there till 1921, when he came to England, where he remained till August, 1939. In July, 1933, he applied for and obtained a British passport, which in September, 1938, was renewed for one year, and again on August 24, 1939, for a like period. He left England after that date, and between September 18, 1939, and July, 1940, broadcast from Germany propaganda on behalf of the enemy. There was no evidence that the appellant kept the passport for use on or after September 18, 1939. The Judge at the trial directed the jury that if they accepted the facts with regard to the issue and currency of the passport and the departure of the appellant from the realm after its last renewal the appellant remained under the duty of allegiance to the Crown at the material time.

Held, by the majority of the House of Lords (the Lord Chancellor, Lord Macmillan, Lord Wright and Lord Simonds, Lord Porter dissenting) affirming the decision of the Court of Criminal Appeal, that, so long as the appellant held a British passport which was capable of affording him the protection of the Crown, he was enjoying that protection so as to raise a corresponding duty of allegiance, and there being no suggestion that he had surrendered his passport or taken any

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step to withdraw from his allegiance, he remained under the duty of allegiance at the material time and was, accordingly, properly convicted of treason.

Per LORD PORTER: The renewal of the passport was evidence from which a jury might infer the continuance of the duty of allegiance, but unless the appellant continued to retain the passport for use as a potential protection, the duty of allegiance would cease. Whether he did so retain it or not at the material time was an issue of fact for the jury to decide, and they should have been directed accordingly.

Appeal from an order of the Court of Criminal Appeal dismissing an appeal against conviction.

The appellant, who was an American citizen, was convicted at the Central Criminal Court on September 19, 1945, of high treason by adhering to the King's enemies elsewhere than in the King's realm, and was sentenced by Tucker, J., to death.

The following facts were stated by the Court of Criminal Appeal: The appellant was born in the United States of America in 1906, the son of a naturalised American citizen, and thereby became himself a natural-born American citizen. When about three years of age he was brought to Ireland where he stayed until about 1921, when he came to England. He stayed in England until 1939, being then thirty-three years of age. He was, therefore, brought up, educated, and settled within the King's dominions. On July 4, 1933, he made application for a British passport, describing himself as a British subject by birth, having been born in Galway, the passport being asked for for the purpose of holiday touring in Belgium, France, Germany, Switzerland, Italy and Austria. He was granted the passport, as such British subject by birth, for a period of five years. On September 24, 1938, he applied for a renewal of that passport for a further period of one year, again describing himself as a British subject by birth who had not lost that national status. That application was granted. On August 24, 1939, he made a further application for the further renewal for one

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year of that passport, again describing himself as a British subject by birth who had not lost that national status, and the passport was again renewed, to expire on July 1, 1940. On his arrest there was found in the possession of the appellant a document showing that he had been engaged by the German Radio Company of Berlin-Charlottenburg as from September 18, 1939, as an announcer of English news.

On October 30, 31, and November 1, 1945, the Court of Criminal Appeal (the Lord Chief Justice, Mr. Justice Humphreys and Mr. Justice Lynskey) heard the appeal.

G. O. Slade, K.C., Derek Curtis Bennett, K.C., and *J. Burge,* for the appellant:

The first submission on behalf of the appellant is that the local allegiance owed by an alien continues only so long as he is resident within the King's dominions. The leading authority is CALVIN'S CASE (1609), 7 Co. Rep. 1a, and in that case and in subsequent cases it was held that "protection draws allegiance, just as allegiance draws protection". To owe allegiance, an alien must be physically resident within the King's dominions, and he enjoys the King's protection only so long as he is resident within those dominions. The counterpart to allegiance is protection, and protection subsists only where the King's peace is in force, that is to say, within his dominions. There are two submissions subsidiary to this main submission. The first is that the protection referred to is the protection of British law, and the second is that protection means the legal right to protection, and not merely *de facto* protection, such as might be enjoyed by a person who possessed a forged passport until the fraud was discovered. In Blackstone's *Commentaries,* Book I, chap. 10, p. 370, the matter is stated thus: "Local allegiance is such as is due from an alien, or stranger born, for so long time as he continues within the King's dominion and protection; and it ceases the instant such stranger transfers himself from this kingdom to another. Natural allegiance is therefore perpetual, and

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local temporary only. . . . As the prince affords his protection to an alien only during his residence in this realm, the allegiance of an alien is confined (in point of time) to the duration of such his residence, and (in point of locality) to the dominions of the British Empire." A British subject owes natural allegiance to the King, because the protection of British laws can be extended to the King's subjects wherever they may be, just as the King has a right to legislate for his subjects wherever they may be, and that is recognised by the comity of nations. But it would not be recognised by the comity of nations for the King to legislate for aliens outside his dominions, and an alien accordingly loses the protection of British law once he leaves the King's dominions, and accordingly at that moment ceases to owe local allegiance. In Foster's *Crown Cases* (3rd ed., 1809, at p. 183) the limits of local allegiance were put more widely: "Local allegiance is founded in the protection a foreigner enjoyeth for his person, his family, or his effects, during his residence here; and it ceaseth whenever he withdraweth with his family and effects." It is submitted that that wider interpretation is wrong, and that the continued presence of the alien's family and effects in the King's dominions is immaterial. Even accepting the wider implications of the rule there laid down, there was no evidence in the present case that the appellant left family or effects in this country. The following further passages appear in Foster's *Crown Cases*. At p. 185: "And if such alien, seeking the protection of the Crown, and having a family and effects here, should, during a war with his native country, go thither, and there adhere to the King's enemies *for purposes of hostility*, he might be dealt with as a traitor. For he came and settled here under the protection of the Crown; and, though his person was removed for a time, his effects and family continued still under the same protection. This rule was laid down by all the Judges assembled at the Queen's command, January 12, 1707"; and at p. 186, referring to aliens, "for their *persons* are under the protection of the law; and, in consequence of

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that protection, they owe a local temporary allegiance to the Crown." Except in the resolution here referred to, no distinction has ever been drawn between the local allegiance owed by the alien himself and the allegiance owed by him vicariously, because of the presence of his family and effects in the King's dominions. The resolution was referred to in East's *Pleas of the Crown* (1803), at p. 52: "Local allegiance is that which is due from a foreigner during his residence here; and is founded in the protection he enjoys for his own person, his family, and effects, during the time of that residence. This allegiance ceases whenever he withdraws with his family and effects: for his temporary protection being then at an end, the duty arising from it also determines. But if he only go abroad himself leaving his family and effects here under the same protection, the duty still continues; and if he commit treason, he may be punished as a traitor; and this whether his own Sovereign be at enmity or at peace with ours." [He referred also to Bacon's *Abridgment* (7th ed., 1832), Vol. I, p. 178; and Hale's *Pleas of the Crown*, Vol. I, p. 92.]

[THE LORD CHIEF JUSTICE.—The learned authors to whom you have referred were not thinking of the facts of a case like the present case. The present case exhibits new facts, and the Court must consider whether those facts fall within the principle concerned.] The decision of Tucker, J., in the present case is not an application of existing law to new facts, but involves an alteration of the law. It is, in effect, a decision that the possession of a British passport, without any evidence as to the holder's acts and intentions, is a substitute for the presence of family and effects in the King's dominions. Here all the prerequisites formulated by the Resolution of the Judges in 1707 were lacking. The most recent statement of the law is to be found in the opinions of the noble and learned Lords in JOHNSTONE *v.* PEDLAR, [1921] 2 A. C. 262. At p. 292 Lord Sumner said: "The matter . . . is the contrast between *ligeantia localis*, which begins no earlier than and continues no longer than the presence of the alien

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amy within the realm, and the lasting allegiance of the subject born." And at p. 297 Lord Phillimore said: "From the moment of his entry into the country the alien owes allegiance to the King till he departs from it, and allegiance, subject to a possible qualification which I shall mention, draws with it protection, just as protection draws allegiance."

The second main submission is that no Court in this country had jurisdiction to try the offence charged in the present case, as it was an offence alleged to have been committed by an alien abroad. With the sole exception of piracy *jure gentium*, which by the comity of nations is justiciable anywhere, there has never been a case in the history of the criminal law of this country in which its Courts have assumed jurisdiction over an alien in respect of an offence committed abroad. In KEYN (1876), 2 Ex. D. 63, a majority of seven Judges to six held that a foreigner in command of a foreign ship could not be indicted in this country for manslaughter in respect of an act done by him within the three-mile limit. The decision was subsequently reversed by the Territorial Waters Act, 1878. There was, however, a passage in the judgment of Sir Alexander Cockburn, C.J., at p. 236, which is highly relevant in the present case: "According to the doctrine of Lord Coke in CALVIN'S CASE ((1609), 7 Co. Rep. 1a), protection and allegiance are correlative: it is only where protection is afforded by the law that the obligation of allegiance to the law arises; or, as I prefer to put it, it is only for acts done when the person doing them is within the area over which the authority of British law extends, that the subject of a foreign State owes obedience to that law, or can be made amenable to its jurisdiction. But for the opinion expressed by my brother Denman, I should have thought it beyond all dispute that a foreign ship, when not in British waters, but on the high seas, was not subject to our law. Upon this point I had deemed all jurists unanimous, and could not have supposed that a doubt could exist. Upon what is the contrary opinion founded? Simply upon expediency, which

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is to prevail over principle." At common law there was no jurisdiction even over British subjects once they were outside the realm. From time to time Parliament has passed statutes giving the Courts of this country jurisdiction over offences committed by British subjects abroad, but the unfettered powers which Parliament possesses have never been used to give the Courts of this country jurisdiction over an alien who commits an offence outside the realm.

Assuming these submissions are decided against the appellant there remains two further grounds of appeal: "There was no evidence that the renewal of the appellant's passport afforded him or was capable of affording him any protection, or that the appellant ever availed himself or had any intention of availing himself of any such protection; if (contrary to the appellant's contention) there were any such evidence, the issue was one for the jury, and the Judge failed to direct them thereon." No evidence was called to show whether the appellant had ever taken advantage of the British passport, and therefore no facts were left to the jury on the question of protection. Further, the protection which is required and requested under the passport arises out of a request addressed to representatives of the King and not to any foreign official. The Crown could not have jurisdiction to issue a British passport to an alien, *qua* alien, and even assuming that the passport afforded some protection which attracted allegiance, the protection was forfeited so soon as the alien indulged in treasonable actions. It could not be that in all circumstances the alien remained under the duty of local allegiance during the currency of the passport. [The Court intimated that they did not desire to hear the Crown on the last two grounds of appeal.]

Sir Hartley Shawcross, K.C. (*Attorney-General*), *L. A. Byrne*, and *Gerald Howard*, for the Crown.

The incalculable advantage of the whole system of British law is that it does not make a slavish search for exact precedent, but that its principles are capable of being

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adapted to new circumstances as they arise. The question at issue is whether the old and recognised principles of the law of treason can be applied to the present case. There is no rule of international law limiting the jurisdiction of British Courts to deal with offences committed abroad which strike at the security of the State, or to exercise a protective jurisdiction over its subjects abroad. [He referred to Oppenheim's *International Law* (5th ed.), Vol. I, p. 267.] The authorities have limited the crime of treason to persons who owe allegiance to the Crown, and treason can be committed by anyone who is under the protection of the Crown and owes a corresponding allegiance. There is abundant authority for the proposition that the duty of allegiance arises as a kind of reciprocal obligation to the protection given by the Crown. The essential question, therefore, is not where treason can be committed, but by what persons it can be committed. At common law a British subject committing treason abroad can be tried here: CASEMENT, 12 Cr. App. R. 99; [1917] 1 K. B. 98. Once a person is under a duty of allegiance, it does not matter that he is an alien, nor does it matter that he is an alien temporarily absent abroad. It is conceded that an allegiance originally based on residence can be terminated, but the test is whether the protection which originated in physical presence in the King's dominions has been retained by some tie between the alien and the Crown or not. Such a tie may be brought about in various ways. One would be by leaving family or effects in the King's dominions and under the King's protection; another would be by having sworn allegiance; and another by having obtained a passport and so sought for and secured the protection of the Crown. The Judges' Resolution of 1707 clearly laid down the principle that protection might continue even after physical presence of the alien in the King's dominions had terminated, and this has been recognised by eminent writers on the common law. The protection contemplated was not, in former days, protection of the laws, but rather intervention by the King under his prerogative or

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dispensing powers to protect the alien from laws which discriminated against him.

A passport was originally granted to enable the person holding it to obtain safe conduct through the King's territory. Later, a passport extended the King's protection into the field of international law. The present form of passport contains a request in the name of the King to the representative of a foreign State to let the bearer pass through its territory, and secondly it requires the King's servants to offer the bearer all assistance and protection which he may need. In the present case the appellant secured the protection of the Crown by obtaining a passport, and it is quite immaterial how that passport was obtained. To take a parallel example, a person who fraudulently obtained a certificate of naturalisation would have all the rights of a naturalised citizen until it was revoked. The highest way in which the case for the appellant can be put is that, while the appellant was in a country with which His Majesty was at war, the protection of the Crown was in suspense because it could not reach him. It is conceded that an alien may throw off the protection which he has obtained by a clear and unequivocal renunciation, but in the present case there was no evidence that the appellant had ever thrown off the protection until he became naturalised in Germany. By making his home in England and by applying for a passport as a British subject, the appellant acquired the protection of the Crown and did not throw off that protection merely by going abroad, as he said in the application for the passport, for the purpose of a holiday.

G. O. Slade, K.C., in reply.

A confusion appears to have arisen between allegiance and nationality. Foreigners can, of course, be tried in this country for offences committed within its jurisdiction, but allegiance is based on considerations other than nationality. In MACLEOD *v.* ATT.-GEN. FOR NEW SOUTH WALES, [1891] A. C. 455, at p. 458, Lord Halsbury, L.C., quoted the judgment of Parke, B., in JEFFERYS *v.* BOOSEY (1854), 4

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H. L. Cas. 815, at p. 926: "The Legislature has no power over any persons except its own subjects—that is, persons natural born subjects or resident or whilst they are within the limits of the Kingdom. The Legislature can impose no duties except on them; and when legislating for the benefit of persons must, *prima facie*, be considered to mean the benefit of those who owe obedience to our laws and whose interests the Legislature is under a correlative duty to protect." Lord Halsbury, continuing, said: "All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed, and except over her own subjects Her Majesty and the Imperial Legislature have no power whatever." The Judges' Resolution of 1707 cannot be reconciled with Blackstone or with the view of Lord Sumner in JOHNSTONE *v.* PEDLAR (*supra*).

Cur. adv. vult.

Nov. 7.—The following judgment of the Court was read:

THE LORD CHIEF JUSTICE: William Joyce, the appellant in this case, was convicted at the Central Criminal Court of the crime of high treason in that he on September 18, 1939, and between that date and July 2, 1940, being a person owing allegiance to our Lord the King traitorously adhered to and gave aid and comfort to the King's enemies without the realm of England, to wit, in the realm of Germany, by broadcasting to the King's subjects propaganda on behalf of the said enemies. The indictment contained two other counts charging the crime of high treason but alleging that the appellant was a British subject. Upon those counts the appellant was acquitted with the approval of the presiding Judge, Tucker, J., and the Attorney-General representing the Crown, as the evidence showed clearly that he never has been a British subject. In those circumstances, the count of the indictment upon which the conviction took place may be treated as a count charging the appellant that he not being a British subject but being a person owing allegiance did adhere to the King's enemies as aforesaid. The jury,

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upon evidence amply sufficient for the purpose, found that the appellant did adhere to and aid and comfort the King's enemies without the realm of England, to wit, in the realm of Germany as alleged, and the learned Judge held as a matter of law that at that time the appellant was a person owing allegiance to His Majesty. It is against that decision in law that this appeal is brought and it is common ground that if that decision was wrong the conviction cannot stand. [His Lordship stated the facts as set out above, and continued.] On those facts it is clear beyond dispute that the appellant at least up to August 24, 1939, owed allegiance to the Crown as an alien "resident", whatever that word may mean, in this country who was here under the protection of the Crown. The grounds upon which that duty is based have not always been stated by Judges in the same terms, but it cannot be doubted that any Court which is called upon to decide the question whether a person, not being a British subject, is guilty of treason committed beyond the realm is bound to have regard to the evidence as to his being resident in the King's dominions, and to the evidence as to his being at the material time under the protection of the Crown. We do not doubt that such a person may by his acts be shown to have withdrawn himself from that protection and to have ceased to be resident in England, with the result that the duty of allegiance is no longer owed by him. Each case must be decided upon its own facts. We are not called upon to lay down, and have no intention of laying down, the law applicable to every case of treason beyond the realm charged to have been committed by an alien. We have to look at the evidence in this case and upon that evidence to decide whether the trial Judge was right or wrong in holding as a matter of law that on September 18, 1939, and between that date and July 2, 1940, this appellant did owe allegiance to the King. Now we agree with Tucker, J., that the proper way of approaching that question is to see whether anything had happened between August 24 and September 18 to divest the appellant of that

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duty of allegiance which he unquestionably owed at the earlier of those dates. The one and only fact relied upon by counsel on his behalf is that he left England at some date after August 24 and travelled to Germany. The argument was that the act of leaving England, whatever may have been the circumstances, rendered the appellant incapable of committing the offence charged since the physical presence in the King's dominions of the appellant is and was essential to the commission by him, being an alien, of the crime of high treason. If that argument is sound, no alien can ever be guilty of that form of high treason which consists of adhering to the King's enemies without the realm. It is a startling proposition and one which after mature consideration this Court is quite unable to accept. It appears to be based to a great extent upon the language of Sir William Blackstone in his *Commentaries*, Book I, ch. 10, at page 370: "Local allegiance is such as is due from an alien, or stranger born, for so long time as he continues within the king's dominion and protection; and it ceases the instant such stranger transfers himself from this kingdom to another. . . . As, therefore, the prince is always under a constant tie to protect his natural-born subjects at all times and in all countries, for this reason their allegiance due to him is equally universal and permanent. But, on the other hand, as the prince affords his protection to an alien only during his residence in this realm, the allegiance of an alien is confined (in point of time) to the duration of such his residence, and (in point of locality) to the dominions of the British Empire."

That statement of the law may be accepted as perfectly correct so far as it goes and it is in accord with the writings of all the great masters of the Common Law, but it is not exhaustive, for it omits something which must, we think, have been known to Sir William Blackstone lecturing and writing in the middle of the eighteenth century. His *Commentaries* were first published in 1765. We find nothing in that passage to indicate that in the opinion of the writer

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the residence so much insisted upon by him would be broken by a mere temporary absence on business or pleasure. The writer makes no attempt to define the word "residence" or explain what he means. The reason for the omission may be that Blackstone's *Commentaries* form, to use the language of the Earl of Birkenhead in his short *Life of Blackstone* (p. 203), "an elementary text-book for students and must be judged as such". However that may be, Sir Michael Foster in his book upon Crown Law, first published in 1762, having in section 1, page 183, of the "Introduction to the Discourse on High Treason", dealt with the case of natural-born subjects, deals in sections 2 and 3 with aliens whose Sovereign is either in amity with or at enmity with the Crown of England, and lays down the law with regard to such persons in much the same language as is used by Blackstone. He then observes in section 4: "And if such alien seeking the protection of the Crown, and having a family and effects here, should during a war with his native country go thither and there adhere to the King's enemies *for purposes of hostility*, he might be dealt with as a traitor. For he came and settled here under the protection of the Crown; and though his person was removed for a time, his effects and family continued still under the same protection. This rule was laid down by all the Judges assembled at the Queen's command January 12, 1707."

In 1803 Mr. East published his work upon the Pleas of the Crown and refers in similar terms to that Resolution of the Judges, and after discussing the circumstances in which the Resolution came to be passed appears to treat it as settled law.

Serjeant Hawkins in the first edition of his book upon the Pleas of the Crown, published in 1716, makes no reference to this Resolution of the Judges, but in later editions of his work he sets out that Resolution in the same terms as the other writers, as do all other text-book writers, and we have not been referred to any work of authority or to the judgment of any Court disapproving of the law as there

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stated. Criticisms have been made by Mr. Slade upon the practice of the Judges holding such meetings and those criticisms may be well-founded, but the law as stated and accepted by Foster and others has stood unchallenged, as Mr. Slade admits, for nearly two hundred and fifty years, and we cannot now hold that we are not bound by it.

The importance of the matter in the decision of the present case is two-fold. If the law as stated by Foster is correct, it is clear that Mr. Slade has put his case much too high in claiming as he does that the appellant could not in law be guilty of high treason committed abroad because he was not a British subject, and secondly, it seems to negative a further proposition based on want of jurisdiction to be referred to later in this judgment. It does not purport to show that the present appellant was guilty of the crime charged since the case put does not apply here, there being no evidence that the appellant on going abroad left his wife or effects behind him. It still remains for the Crown to show that upon the proved facts of this case he did owe the duty of allegiance to His Majesty. If there was no other evidence upon the subject than the proved fact of his departure from England after August 24, the Crown might be in a great difficulty and we express no opinion as to what would have been the proper course to adopt beyond observing that it might have been necessary to leave further matters to the jury, since the jury alone can draw inferences of fact from such evidence as they accept. But in our judgment the facts relating to the application for, the granting of, and the renewal of, the passport in this case make it clear that as a matter of law the appellant was still owing allegiance to the Crown when he commenced to adhere to the King's enemies by broadcasting as alleged in the indictment and found by the jury. We cannot agree with Mr. Slade that the case of the appellant is to be treated as precisely the same as that of a foreigner who had once in his life paid a visit to this country of a few hours' duration. Blackstone seems to require "residence", Foster speaks of a person "settled" here. We were much pressed by the

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appellant's counsel with a number of cases in which there are *dicta* in favour of the appellant's contention. The high-water mark of these cases is perhaps to be found in JOHNSTONE *v.* PEDLAR, [1921] 2 A. C. 262. One quotation will suffice. Lord Sumner (at p. 292) said: "The matter which he [Lord Coke] had in hand is the contrast between *ligeantia localis*, which begins no earlier than and continues no longer than the presence of the alien *amy* within the realm, and the lasting allegiance of the subject born." That passage did not touch the question which we have to consider. It certainly does not define the offence of treason. The only point argued was whether the defendant could rely on a plea that the plaintiff was an alien, and that his money had been detained by direction of the Crown as an act of State. It was held that the plea was bad.

On his arrest the appellant made a statement put in evidence at the trial which contained these passages: "We (that is, his parents and himself) left America in 1909 when I was three years old. We were generally counted as British subjects during our stay in Ireland and England. I was in Ireland from 1909 till 1921 when I came to England. We were always treated as British during the period of my stay in England, whether we were or not." It was further proved that in 1922 the appellant wrote a letter asking to be admitted as a member of the Officers' Training Corps attached to the University of London, stating that he had been born in America but of British parents, that he left America when two years of age, that he had not returned since to America, and did not propose to return there, that he had been informed at the brigade headquarters in Ireland that he possessed the same rights and privileges as he would if he had been of natural British birth, and added that he could obtain testimonials as to his loyalty to the Crown. Following upon that came the application for the passport and the two renewals of the passport, the last being as stated on August 24, 1939, so that on the very eve of war the appellant had taken every step in his power to safeguard his right of re-entry

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into England, and meanwhile to insure his treatment in any foreign country as a British citizen. A British passport is something more than a means of identification. It is a document, as was stated by the Lord Chief Justice (Lord Alverstone) in BRAILSFORD, [1905] 2 K. B. 730, at p. 745, of high public importance. He observes: "It will be well to consider what a passport really is. It is a document issued in the name of the Sovereign on the responsibility of a Minister of the Crown to a named individual, intended to be presented to the Governments of foreign nations and to be used for that individual's protection as a British subject in foreign countries, and it depends for its validity upon the fact that the Foreign Office in an official document vouches the respectability of the person named."

The form of passport issued in this case requests the foreign Government and requires the diplomatic and consular representatives of His Majesty in foreign countries, in the name of His Majesty, to allow the bearer to pass freely without let or hindrance, and to afford him every assistance and protection of which he may stand in need, and the possession of such a document clearly entitles the holder to return to the country which has issued the passport. It is, therefore, plainly a protection in every sense of that word to the holder while he is absent from the King's realm. We entertain no doubt that if it is possible for a foreigner to owe the duty of allegiance to the British Crown although not at the moment within the British realm, as we think it is, the appellant at the time when he adhered to the King's enemies did owe that allegiance.

The next point made by counsel for the appellant was one which he expressed as being a point raising the question of jurisdiction. The point as stated by the learned counsel was this. Assuming that the appellant was proved to have been a person owing allegiance to the King at the time when he did adhere to the King's enemies in the realm of Germany, nevertheless he cannot be tried for that offence by any Court in England. We experience some difficulty in understanding

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precisely the grounds upon which this submission was made. It is said to be complementary to the other submission that because the appellant was an alien he could not commit the offence charged against him in the indictment, and therefore could not be tried for it, but upon the footing that an alien may commit and that this appellant did commit the crime charged in the indictment, we find it difficult to understand why he cannot be tried for that crime. It is quite true to say that the statute of 1351 creating the offence does not refer in terms to the trial anywhere of a person offending against the statute and the point was one which troubled, as the books show, the minds of lawyers in many cases and for many years. Indeed, it was for the reason that there was no clear pronouncement by Parliament as to where, and by whom, a person ought to be tried who offended abroad against the statute of 1351 that Parliament in 1543 passed the Act of 35 Hen. 8, c. 2: "An Act concerning the trial of treasons committed out of the King's Majesty's Dominion." Section 1. Venue for treasons committed abroad—"Forasmuch as some doubts and questions have been moved that certain kinds of treasons . . . done, perpetrated or committed out of the King's Majesty's Realm of England . . . cannot . . . by the common laws of this realm be inquired of, heard and determined within this his said realm of England: for a plain remedy . . . be it enacted . . . that all manner of offences, being already made or declared or hereafter to be made or declared by any of the laws and statutes of this realm to be treasons . . . and done, perpetrated or committed or hereafter to be done, perpetrated or committed by any person or persons out of this realm of England shall be from henceforth inquired of, heard and determined before the King's justices of his bench for pleas to be holden before himself by good and lawful men of the same shire where the said bench shall sit and be kept . . . in like manner and form to all intents and purposes as if such treasons . . . had been done, perpetrated and committed within the same shire where they shall be so inquired of, heard and determined as is aforesaid."

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The shire referred to in the section has been generally understood as Middlesex.

It appears to us that the only point of jurisdiction which can possibly arise upon the terms of this statute depends upon the assumption that the words "any person or persons out of this realm of England" does not include an alien owing allegiance to His Majesty the King. In 1916 the Court of Criminal Appeal dealt with the appeal of Roger David Casement who had been convicted of high treason by adhering to the King's enemies without the realm, and in that case no question was raised upon the appeal other than the question whether the matter described in the indictment was any offence against the Treason Act of 1351, and in giving the judgment of the Court of five Judges, dismissing the appeal, Darling, J., observed as follows (12 Cr. App. R., at p. 120; [1917] 1 K. B., at p. 138): "The statute 35 Hen. 8, c. 2, was passed 'for the trial of treasons committed out of the King's dominions'. The only question dealt with was how such treasons were to be tried. Under this statute the present trial was rightly had in the King's Bench, provided that what was done by appellant amounted to treason under the Act of 1351. If it was such a treason, it was rightly tried." We say the same thing in this case. We can find no justification for holding that because the appellant in this case is not a British subject, therefore, although he can commit the crime alleged in the indictment of being a person who has adhered to the King's enemies while owing allegiance to the King, yet no Court has power to try him because he is an alien. It is right to add that Mr. Slade agreed that if the appellant was triable in this country as the result of the statute of Henry VIII, he was properly so tried at the Central Criminal Court.

A further point was taken by Mr. Slade, that assuming the Court was against him on his first two points there was no evidence that the renewal of the appellant's passport afforded him or was capable of affording him any protection, or that the appellant ever availed himself or had any intention

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of availing himself of any such protection, and if there was any such evidence the issue was one for the jury and the learned Judge failed to direct them thereon. It is true that no direct evidence was called in respect of the effect of the passport, but the document speaks for itself and we have already dealt with its effect in the earlier part of this judgment. In our view, the passport was capable of affording him protection none the less because it was obtained by a misrepresentation and it is quite immaterial whether the appellant availed himself of that protection or not, as he had sought such protection and it was available for his use.

For these reasons we find ourselves in complete agreement with the decision of the trial Judge.

The appeal is dismissed.

The appellant appealed, by fiat of the Attorney-General, to the House of Lords. The appeal was heard on December 10, 11, 12 and 13, 1945.

G. O. Slade, K.C. (*Derek Curtis Bennett*, K.C., and *J. Burge*, with him), for the appellant.

The first submission on behalf of the appellant is that the local allegiance due from an alien continues only so long as he resides within the King's dominions. The second is that "protection draws allegiance just as allegiance draws protection" (CALVIN'S CASE (1609), 7 Co. Rep. 1a), and that the protection there referred to is the protection of British law and is co-extensive only with British legal jurisdiction. The third is that protection means the right to protection, not merely the *de facto* enjoyment of it as might be the case where a passport had been obtained by fraud. The fourth submission relates to jurisdiction, and is that English Courts have no jurisdiction to try an alien for an offence alleged to have been committed abroad, except in the case of piracy and in the case of offences committed on British ships in foreign waters.

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[LORD MACMILLAN.—May there not be a third exception where an Act of Parliament gives the Courts jurisdiction to try an alien for an offence committed abroad, as in cases under the Fisheries Acts and in MORTENSEN *v.* PETERS (1906), 8 F. (Ct. of Sess.) 93.

Parliament can, of course, confer such power on the Courts of this country, but it is unanimously established by the authorities that the expression "a person" when it occurs in a statute dealing with criminal law means a British subject. The Treason Act, 1351, uses the word "homme", but the comity of nations requires that the interpretation of that word be limited to British subjects. The fifth submission is that (a) there was no evidence before the jury that the renewal of the appellant's passport afforded him, or was capable of affording him, any protection, or that he ever availed himself or had any intention of availing himself of such protection, and (b) if contrary to the appellant's contention there was such evidence, that the issue was one for the jury, and the Judge failed to direct them on it.

On the question of allegiance, CALVIN'S CASE (*supra*), and Blackstone's *Commentaries*, Book I, Chap. 10, p. 370, defined local allegiance as being due from an alien for so long as he continued within the King's dominions and protection. A suggested extension is to be found in Foster's *Crown Law* (3rd ed., 1809), p. 185, where the Judges' Resolution of 1707 (cited p. 60, *ante*) is set out. It is submitted that the word "settled" in that Resolution meant resident, that is to say, physically present. In any event, however, the present appellant left no family or effects in this country in 1939. [He referred on this point to Bacon's *Abridgment* (7th ed., 1832), Vol. I, p. 178, and *Coke upon Littleton* (1832 ed.), ss. 198, 199.] While on enemy territory the appellant was incapable of taking advantage of any protection which the King could afford him, and had forfeited the right to protection by going to enemy territory.

[THE LORD CHANCELLOR: The general proposition that allegiance is due from an alien only so long as he is in this

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country appears to be elementary. The question is whether there are any exceptions to that rule.]

It is submitted that no protection outside British territory can be such as to found a duty of allegiance.

[LORD PORTER: What protection is conferred on the holder of a British passport?]

No protection is derived from a passport as such. The protection arises from the fact that the holder is, in a normal case, a British subject and he enjoys that protection whether he holds a passport or not. If the decision of Tucker, J., and the Court of Criminal Appeal is right, the results which would follow would be strange indeed. For example, if a British subject who lawfully held a British passport went to another country and became naturalised there, he would by statute cease to be a British subject immediately on his naturalisation; yet nevertheless he would, on the basis of the decisions of the Courts below, continue to owe allegiance to the Crown for the unexpired term of his passport.

[THE LORD CHANCELLOR: If, contrary to your first three submissions, the appellant did remain under allegiance to the Crown after he left England in 1939, does your fourth submission, with regard to jurisdiction, assist the appellant?]

Even if the appellant did continue to owe allegiance after he left England in 1939, it is contended that there was no Court in this country which had jurisdiction to try him, first, because no statute gives the Courts of this country jurisdiction to try an alien for an offence committed abroad, and secondly, because no Court can confer jurisdiction on itself. Otherwise it would always be possible, merely by an allegation that the accused person owed allegiance, to bring him within the jurisdiction of the Courts of this country on that very issue. A distinction must be maintained between a substantive crime and jurisdiction to try it. [He referred to Maxwell on the *Interpretation of Statutes* (8th ed.), p. 130; JAMESON, [1896] 2 Q. B. 425 and MACLEOD *v.* ATT.-GEN. FOR NEW SOUTH WALES, [1891] A. C. 425, and section 4 of the Treachery Act, 1940, the only possible application of which,

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he contended, to an offence committed by an alien abroad was the case of an offence committed by him while he remained subject to naval, military or air force law.] On the last point submitted, even if all the previous submissions are wrong and the granting of a passport to an alien imported a duty of allegiance on the part of the alien to the Crown, the alien must be able to divest himself of the protection which gave rise to the allegiance, and it must be a question of fact in each case whether he has done so. The issue must be left to the jury in every case, and this was not done in the present case, as Tucker, J., directed them as a matter of law that the appellant continued to owe allegiance during the currency of the passport.

The Attorney-General (*Sir Hartley Shawcross, K.C.*), and *Gerald Howard*, for the Crown.

No branch of English law has been so much subject to judicial construction as the law of treason, and the search for an exact precedent to cover the present case is singularly sterile. There can have been no case in which it has been more necessary to apply not new principles, but established principles of law to new facts. Dealing first with the question of jurisdiction, the argument for the appellant has frequently referred to the comity of nations, but only those rules of international law which are generally and fully accepted have been imported into English law. There is no rule of international law which excludes the jurisdiction of the Court in a case such as the present.

[THE LORD CHANCELLOR: Is your argument that, if there was a duty of allegiance and that a crime was committed in breach of that duty, the question of jurisdiction does not arise?]

Yes. In any event, the question is not where treason can be committed, but by whom it can be committed.

[LORD MACMILLAN: The question appears to be one of status. Is there anything which a person can do to attract protection to himself?]

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Yes, he may take some form of oath or join one of the Services.

[LORD WRIGHT: The act relied on by the Crown as conferring protection on the appellant was not an act done by him, but the issuing of a passport to him.]

There must be a presumption that the appellant, having applied for the passport, used it for the purpose of going abroad. On the question of allegiance and protection, the argument on behalf of the appellant shows a complete misconception of the origin and nature of the protection conferred by a passport. In former times, the protection enjoyed by aliens was essentially an executive protection against English law. The issue of a passport was to enable aliens to pass freely in this country without being hampered by the ordinary operation of the laws which were restrictive and penal where aliens were concerned. It is conceded that a British subject may terminate his allegiance to the Crown by becoming naturalised in a foreign State, but where allegiance does exist there must be some overt act terminating it. In the present case the appellant could have handed back his passport, though it is not conceded that the handing of the passport to a British Consul in Germany would justify the authorities in this country in subsequently refusing to admit the person who had obtained the passport. If the argument for the appellant is correct, a subject of British mandated or British protected territory holding a British passport would not be under a duty of allegiance to the Crown. On the question of residence, mere temporary absence from this country, *e.g.*, in the case of a person going abroad for a holiday, does not put an end to residence. Residence implies something more than mere physical presence. The real basis of allegiance is protection, however it may have originated, and all the old authorities support this view. Even on the outbreak of war with Germany, the protection afforded by a British passport to the holder in Germany did not necessarily come to an end. In such circumstances administrative protection continues, which is exercised by the Crown through

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the medium of the protecting Power, and the holder may derive benefit from that. [On the submission made by counsel for the appellant that the issue whether or not the appellant had made any use of his passport should have been left to the jury, he referred to WOOLMINGTON *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 25 Cr. App. R. 72; [1935] A. C. 462.]

[THE LORD CHANCELLOR: There appears to have been no evidence as to any use made by the appellant of his passport.]

There was a clear inference of user to be drawn from the fact of application for the passport, and the inference was a matter of accepted international usage. The argument that the protection afforded was that of British law is based on a misapprehension of the origin of allegiance, which is derived from status. The appellant had not the status of a British subject, but of a protected person, a status held by many persons who were not British subjects. [He referred to SOVFRACHT (V/O) *v.* GEBR. VAN UDENS SCHEEPVAART, ETC., [1943] A. C. 203.] The burden is on the person who has sought the protection to show that it was not in fact afforded, and it is immaterial that the protection has been obtained by a false or fraudulent representation, because, as a matter of international usage, it is not open to a State to disregard a British passport and deny the holder's nationality. There is no reason in principle, where the Sovereign's protection—using the word as expressing general administrative, executive and legal protection—has been obtained, for limiting the allegiance corresponding to protection to those cases where protection has arisen merely from residence. A person who has made his home in this country and enjoyed the benefits of British citizenship, while temporarily absent from this country, must be held to be under a reciprocal duty of allegiance.

G. O. Slade, K.C., in reply.

The House appears to be confronted with the following principles: (1) Before the present case there has never been a case where an alien has been convicted of treason in

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respect of acts committed abroad; (2) there is no reported case where any Court in this country has assumed jurisdiction to try an alien for an offence committed abroad; (3) the conviction of the appellant rests on the strength of a Resolution passed by the Judges in 1707, which runs counter to all the accepted principles of constitutional law; (4) further, since there was no evidence that the appellant left any family or effects here when he went to Germany in 1939, the conviction runs counter not only to the law as it stood before that Resolution, but to the Resolution itself, and cannot be reconciled with CALVIN'S CASE (*supra*), the view expressed by Blackstone, or the decision of the House in JOHNSTONE *v.* PEDLAR, [1921] 2 A. C. 262, at p. 292. Moreover, there is no intermediate stage between a British subject and a British protected subject, and if the protection afforded by a passport begets allegiance, the protection afforded by a mandate must do so equally. Further, reliance is placed on the authority of Sir Michael Foster. The Judges' Resolution set out in his *Crown Law* (3rd ed., 1809, p. 185) is not in accord with his statement of the law at p. 183. Foster says that local allegiance ceases so soon as the alien withdraws his property and effects, but if the present conviction is right, this is not the case where the alien holds a British passport, and Foster makes it clear that the protection afforded must be the protection of English law, whereas the effect of the present conviction is to contradict that. The complaint with regard to the summing-up is not based on direction on the facts which appeared in evidence, but on failure to direct on facts concerning which no evidence had been given, but which were for the jury, or on an issue which should have been left to them.

The House took time for consideration. On December 18, 1945, the House announced that by the decision of the majority of the House (LORD PORTER, dissenting) the appeal would be dismissed and that they would give their reasons at a later date.

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Feb. 1, 1946.—THE LORD CHANCELLOR (LORD JOWITT): My Lords, on November 7, 1945, the Court of Criminal Appeal dismissed the appeal of the appellant, William Joyce, who had on September 19, 1945, been convicted of high treason at the Central Criminal Court and duly sentenced to death. The Attorney-General certified under section 1 (6) of the Criminal Appeal Act, 1907, that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance and that in his opinion it was desirable in the public interest that a further appeal should be brought. Hence this appeal is brought to your Lordships' House. And, though in accordance with the usual practice the certificate of the Attorney-General does not specify the point of law raised in the appeal, it is clear that the question for your Lordships' determination is whether an alien who has been resident within the realm can be held guilty and convicted in this country for high treason in respect of acts committed by him outside the realm. This is in truth a question of law of far-reaching importance.

The appellant was charged at the Central Criminal Court on three counts, upon the third of which only he was convicted. That count was as follows:—

Statement of offence.

High treason by adhering to the King's enemies elsewhere than in the King's realm, to wit, in the German realm, contrary to the Treason Act, 1351.

Particulars of offence.

William Joyce, on September 18, 1939, and on divers other days thereafter and between that day and July 2, 1940, being then—to wit, on the several days—a person owing allegiance to our Lord the King, and whilst on the said several days an open and public war was being prosecuted and carried on by the German realm and its subjects against our Lord the King and his subjects, then and on the said several days traitorously contriving and intending to aid and assist the said enemies

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of our Lord the King against our Lord the King and his subjects, did traitorously adhere to and aid and comfort the said enemies in parts beyond the seas without the realm of England, to wit, in the realm of Germany, by broadcasting to the subjects of our Lord the King propaganda on behalf of the said enemies of our Lord the King.

The first and second counts, upon which the appellant was found not guilty, were based upon the presumption that he was at all material times a British subject. This assumption was proved to be incorrect; therefore upon these counts the appellant was rightly acquitted.

The material facts are few. The appellant was born in the U.S.A. in 1906, the son of a naturalised American citizen who had previously been a British subject by birth. He thereby became himself a natural-born American citizen. At about three years of age he was brought to Ireland, where he stayed until about 1921, when he came to England. He stayed in England until 1939. He was then thirty-three years of age. He was brought up and educated within the King's dominions, and he settled here. On July 4, 1933, he applied for a British passport, describing himself as a British subject by birth, born in Galway. He asked for the passport for the purpose of holiday touring in Belgium, France, Germany, Switzerland, Italy and Austria. He was granted the passport for a period of five years. The document was not produced, but its contents were duly proved. In it he was described as a British subject. On September 26, 1938, he applied for a renewal of the passport for a period of one year. He again declared that he was a British subject and had not lost that national status. His application was granted. On August 24, 1939, he again applied for a renewal of his passport for a further period of one year, repeating the same declaration. His application was granted, the passport, as appears from the endorsement on the declaration, being extended to July 1, 1940. On some day after August 24, 1939, the appellant left the realm. The exact date of his departure was not proved. Upon his arrest in the year 1945 there was found

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upon his person a "work book" issued by the German State on October 4, 1939, from which it appeared that he had been employed by the German Radio Company of Berlin as an announcer of English news from September 18, 1939. In this document his nationality was stated to be "Great Britain" and his special qualification "English". It was proved to the satisfaction of the jury that he had at the dates alleged in the indictment broadcast propaganda on behalf of the enemy. He was found guilty accordingly.

From this verdict an appeal was brought to the Court of Criminal Appeal, and I think it right to set out the grounds of that appeal. They were as follows: (1) The Court wrongly assumed jurisdiction to try an alien for an offence against British law committed in a foreign country. (2) The learned Judge was wrong in law in holding and misdirected the jury in directing them that the appellant owed allegiance to His Majesty the King during the period from September 18, 1939, to July 2, 1940. (3) There was no evidence that the renewal of the appellant's passport afforded him, or was capable of affording him, any protection or that the appellant ever availed himself or had any intention of availing himself of any such protection. (4) If (contrary to the appellant's contention) there were any such evidence, the issue was one for the jury and the learned Judge failed to direct them thereon. The Court of Criminal Appeal, as I have already said, dismissed the appeal, and it will be convenient if I deal with the grounds of appeal in the same order as did that Court, first considering the important question of law raised in the second ground.

The House is called upon in the year 1945 to consider the scope and effect of a statute of the year 1351, the twenty-fifth year of the reign of Edward III. That statute, as has been commonly said and as appears from its terms, was itself declaratory of the common law; its language differs little from the statement in Bracton (see 2 Bracton 258, Stephen's *History of the Criminal Law*, Vol. II, 243). It is proper to set out the material parts. Thus it runs: "Whereas divers

opinions have been before this time in what case treason shall be said and in what not, the King at the request of the Lords and of the Commons hath made a declaration in the manner as hereafter followeth: that is to say [amongst other things] if a man do levy war against our Lord the King in his realm or be adherent to the King's enemies in his realm, giving them aid and comfort in the realm or elsewhere" then (I depart from the text and use modern terms) he shall be guilty of treason. It is not denied that the appellant has adhered to the King's enemies giving them aid and comfort elsewhere than in the realm. Upon this part of the case the single question is whether, having done so, he can be, and in the circumstances of the case is, guilty of treason.

Your Lordships will observe that the statute is wide enough in its terms to cover any man anywhere, "if *a man* do levy war, etc.". Yet it is clear that some limitation must be placed upon the generality of the language, for the context in the preamble poses the question "in what case treason shall be said and in what not". It is necessary then to prove not only that an act was done but that, being done, it was a treasonable act. This must depend upon one thing only, namely, the relation in which the actor stands to the King to whose enemies he adheres. An act that is in one man treasonable may not be so in another.

In the long discussion which your Lordships have heard upon this part of the case attention has necessarily been concentrated on the question of allegiance. The question whether a man can be guilty of treason to the King has been treated as identical with the question whether he owes allegiance to the King. An act, it is said, which is treasonable if the actor owes allegiance, is not treasonable if he does not. As a generalisation, this is undoubtedly true and is supported by the language of the indictment, but it leaves undecided the question by whom allegiance is owed and I shall ask your Lordships to look somewhat more deeply into the principle upon which this statement is founded, for it is by the application of principle to changing circumstances that

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our law has developed. It is not for His Majesty's Judges to create new offences or to extend any penal law and particularly the law of high treason, but new conditions may demand a reconsideration of the scope of the principle. It is not an extension of a penal law to apply its principle to circumstances unforeseen at the time of its enactment, so long as the case is fairly brought within its language.

I have said, my Lords, that the question for consideration is bound up with the question of allegiance. Allegiance is owed to their Sovereign Lord the King by his natural born subjects; so it is by those who, being aliens, become his subjects by denisation or naturalisation (I will call them all "naturalised subjects"); so it is by those who, being aliens, reside within the King's realm. Whether you look to the feudal law for the origin of this conception or find it in the elementary necessities of any political society, it is clear that fundamentally it recognises the need of the man for protection and of the Sovereign Lord for service. *Protectio trahit subjectionem et subjectio protectionem.* All who were brought within the King's protection were *ad fidem regis*; all owed him allegiance. The topic is discussed with much learning in CALVIN'S CASE (1608), 7 Co. Rep. 1a.

The natural-born subject owes allegiance from his birth, the naturalised subject from his naturalisation, the alien from the day when he comes within the realm. By what means and when can they cast off allegiance? The natural-born subject cannot at common law at any time cast it off. *Nemo potest exuere patriam* is a fundamental maxim of the law from which relief was given only by recent statutes. Nor can the naturalised subjects at common law. It is in regard to the alien resident within the realm that the controversy in this case arises. Admittedly he owes allegiance while he is so resident, but it is argued that his allegiance extends no further. Numerous authorities were cited by the learned counsel for the appellant, in which it is stated without any qualification or extension that an alien owes allegiance so long as he is within the realm, and it has been argued with

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great force that the physical presence of the alien actor within the realm is necessary to make his act treasonable. It is implicit in this argument that during absence from the realm, however brief, an alien ordinarily resident within the realm cannot commit treason; he cannot under any circumstances by giving aid and comfort to the King's enemies outside the realm be guilty of a treasonable act. My Lords, in my opinion this, which is the necessary and logical statement of the appellant's case, is not only at variance with the principle of the law, but is inconsistent with authority which your Lordships cannot disregard.

I refer first to authority. It is said in Foster's *Crown Cases* (3rd ed.), p. 183: "Local allegiance is founded in the protection a foreigner enjoyeth for his person, his family or effects during his residence here: and it ceaseth, whenever he withdraweth with his family and effects." And then on p. 185 comes the statement of law upon which the passage I have cited is clearly founded: "Sect. 4. And if such alien, seeking the protection of the Crown and having a family and effects here should during a war with his native country go thither and there adhere to the King's enemies for purposes of hostility, he might be dealt with as a traitor. For he came and settled here under the protection of the Crown; and, though his person was removed for a time, his effects and family continued still under the same protection. This rule was laid down by all the Judges assembled at the Queen's command Jan. 12th 1707." The author has a side-note against the last line of this passage: "MSS. Tracy, Price, Dod and Denton". These manuscripts have not been traced, but their authenticity is not questioned. It is, indeed, impossible to suppose that Sir Michael Foster could have incorporated such a statement except upon the surest grounds, and it is to be noted that he accepts equally the fact of the Judges' Resolution and the validity of its content. This statement has been repeated without challenge by numerous authors of the highest authority: *e.g.*, Hawkins, *Pleas of the Crown* (1795 ed.); East, *Pleas of the Crown*, Vol. I, p. 52; Chitty,

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on the *Prerogatives of the Crown*, pp. 12, 13. It may be said that the language of some of these writers is not that of enthusiastic support, but neither in the text-books written by the great masters of this branch of the law nor in any judicial utterance has the statement been challenged. Moreover, it has been repeated without any criticism in our own times by Sir William Holdsworth, whose authority on such a matter is unequalled: see his article in Halsbury's *Laws of England* (2nd ed.), Vol. VI, p. 416, note (*t*), sub-title "Constitutional Law".

Your Lordships can give no weight to the fact that in such cases as JOHNSTONE *v.* PEDLAR, [1921] 2 A. C. 262, the local allegiance of an alien is stated without qualification to be coterminous with his residence within the realm. The qualification that we are now discussing was not relevant to the issue nor brought to the mind of the Court. Nor was the Judges' Resolution referred to nor the meaning of "residence" discussed.

In my view, therefore, it is the law that in the case supposed in the Resolution of 1707 an alien may be guilty of treason for an act committed outside the realm. The reason which appears in the Resolution is illuminating. The principle governing the rule is established by the exception: "though his person was removed for a time, his family and effects continued under the same protection", that is, the protection of the Crown. The vicarious protection still afforded to the family, which he had left behind in this country, required of him a continuance of his fidelity. It is thus not true to say that an alien can never in law be guilty of treason to the Sovereign of this realm in respect of an act committed outside the realm.

My Lords, here no question arises of a vicarious protection. There is no evidence that the appellant left a family or effects behind him when he left this realm. I do not for this purpose regard parents or brothers or sisters as a family. But though there was no continuing protection for his family or effects, of him too it must be asked, whether there was not

such protection still afforded by the Sovereign as to require of him the continuance of his allegiance. The principle which runs through feudal law and what I may perhaps call constitutional law requires on the one hand protection, on the other fidelity; a duty of the Sovereign Lord to protect, a duty of the liege or subject to be faithful. Treason, "trahison", is the betrayal of a trust; to be faithful to the trust is the counterpart of the duty to protect. It serves to illustrate the principle which I have stated that an open enemy who is an alien, notwithstanding his presence in the realm, is not within the protection nor, therefore, within the allegiance of the Crown. He does not owe allegiance because although he is within the realm he is not under the Sovereign's protection.

The question then is how is this principle to be applied to the circumstances of the present case. My Lords, I have already stated the material facts in regard to the appellant's residence in this country, his applications for a passport, and the grant of such passport to him, and I need not restate them. I do not think it necessary in this case to determine what for the purpose of the doctrine, whether stated with or without qualification, constitutes for an alien "residence" within the realm. It would, I think, be strangely inconsistent with the robust and vigorous common sense of the common law to suppose that an alien, quitting his residence in this country and temporarily on the high seas beyond territorial waters or at some even distant spot now brought within speedy reach and there adhering and giving aid to the King's enemies, could do so with impunity. In the present case the appellant had long resided here and appears to have had many ties with this country, but I make no assumption, one way or another, about his intention to return, and I do not attach any importance to the fact that the original passport application and, therefore, presumably the renewals also were for "holiday touring". The material facts are these, that being for long resident here and owing allegiance he applied for and obtained a passport and, leaving the realm, adhered to the King's

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enemies. It does not matter that he made false representations as to his status, asserting that he was a British subject by birth, a statement that he was afterwards at pains to disprove. It may be that when he first made the statement he thought it was true. Of this there is no evidence. The essential fact is that he got the passport and I now examine its effect.

The actual passport issued to the appellant has not been produced, but its contents have been duly proved. The terms of a passport are familiar. It is thus described by Lord Alverstone, C.J., in BRAILSFORD, [1905] 2 K. B. 730, at p. 745: "It is a document issued in the name of the Sovereign on the responsibility of a Minister of the Crown to a named individual, intended to be presented to the Governments of foreign nations and to be used for that individual's protection as a British subject in foreign countries." By its terms it requests and requires in the name of His Majesty all those whom it may concern to allow the bearer to pass freely without let or hindrance and to afford him every assistance and protection of which he may stand in need. It is, I think, true that the possession of a passport by a British subject does not increase the Sovereign's duty of protection, though it will make his path easier. For him it serves as a voucher and means of identification. But the possession of a passport by one who is not a British subject gives him rights and imposes upon the Sovereign obligations which would otherwise not be given or imposed. It is immaterial that he has obtained it by misrepresentation and that he is not in law a British subject. By the possession of that document he is enabled to obtain in a foreign country the protection extended to British subjects. By his own act he has maintained the bond which while he was within the realm bound him to his Sovereign. The question is not whether he obtained British citizenship by obtaining the passport, but whether by its receipt he extended his duty of allegiance beyond the moment when he left the shores of this country. As one owing

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allegiance to the King, he sought and obtained the protection of the King for himself while abroad.

Your Lordships were pressed by counsel for the appellant with a distinction between the protection of the law and the protection of the Sovereign, and he cited many passages from the books in which the protection of the law was referred to as the counterpart of the duty of allegiance. Upon this he based the argument that, since the protection of the law could not be given outside the realm to an alien, he could not outside the realm owe any duty. This argument, in my opinion, has no substance. In the first place, reference is made as often to the protection of the Crown or Sovereign or Lord or Government as to the protection of the law, sometimes also to protection of the Crown and the law. In the second place, it is historically false to suppose that in olden days the alien within the realm looked to the law for protection except in so far as it was part of the law that the King could by the exercise of his prerogative protect him. It was to the King that the alien looked and to his dispensing power under the prerogative. It is not necessary to trace the gradual process by which the civic rights and duties of a resident alien became assimilated to those of the natural-born subject; they have, in fact, been assimilated, but to this day there will be found some difference. It is sufficient to say that at the time when the common law established between Sovereign Lord and resident alien, the reciprocal duties of protection and allegiance it was to the personal power of the Sovereign rather than to the law of England that the alien looked. It is not, therefore, an answer to the Sovereign's claim to fidelity from an alien without the realm who holds a British passport that there cannot be extended to him the protection of the law.

What is this protection upon which the claim to fidelity is founded? To me, my Lords, it appears that the Crown in issuing a passport is assuming an onerous burden, and the holder of the passport is acquiring substantial privileges. A well-known writer on international law has said (see

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Oppenheim (5th ed.), Vol. I, p. 556) that "by a universally recognised customary rule of the law of nations every State holds the right of protection over its citizens abroad". This rule thus recognised may be asserted by the holder of a passport which is for him the outward title of his rights. It is true that the measure in which the State will exercise its right lies in its discretion. But with the issue of the passport the first step is taken. Armed with that document, the holder may demand from the State's representatives abroad and from the officials of foreign Governments that he be treated as a British subject, and even in the territory of a hostile State may claim the intervention of the protecting Power. I should make it clear that it is no part of the case for the Crown that the appellant is debarred from alleging that he is not a British subject. The contention is a different one: it is that by the holding of a passport he asserts and maintains the relation in which he formerly stood, claiming the continued protection of the Crown and thereby pledging the continuance of his fidelity. In these circumstances I am clearly of opinion that so long as he holds the passport he is, within the meaning of the statute, a man who, if he is adherent to the King's enemies in the realm or elsewhere, commits an act of treason.

There is one other aspect of this part of the case with which I must deal. It is said that there is nothing to prevent an alien from withdrawing from his allegiance when he leaves the realm. I do not dissent from this as a general proposition. It is possible that he may do so even though he has obtained a passport. But that is a hypothetical case. Here there was no suggestion that the appellant had surrendered his passport or taken any other overt step to withdraw from his allegiance, unless indeed reliance is placed on the act of treason itself as a withdrawal. That, in my opinion, he cannot do. For such an act is not inconsistent with his still availing himself of the passport in other countries than Germany and possibly even in Germany itself. It is not to be assumed that the British authorities could

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immediately advise their representatives abroad or other foreign Governments that the appellant, though the holder of a British passport, was not entitled to the protection that it appeared to afford. Moreover, the special value to the enemy of the appellant's services as a broadcaster was that he could be represented as speaking as a British subject, and his German work book showed that it was in this character that he was employed, for which his passport was doubtless accepted as the voucher.

The second point of appeal (the first in formal order) was that in any case no English Court has jurisdiction to try an alien for a crime committed abroad, and your Lordships heard an exhaustive argument upon the construction of penal statutes. There is, I think, a short answer to this point. The statute in question deals with the crime of treason committed within or, as was held in CASEMENT, 12 Cr. App. R. 99; [1917] 1 K. B. 98, without the realm; it is general in its terms and I see no reason for limiting its scope except in the way that I indicated earlier in this opinion, *viz.*, that, since it is declaratory of the crime of treason, it can apply only to those who are capable of committing that crime. No principle of comity demands that a State should ignore the crime of treason committed against it outside its territory. On the contrary, a proper regard for its own security requires that all those who commit that crime, whether they commit it within or without the realm, should be amenable to its laws. I share to the full the difficulty experienced by the Court of Criminal Appeal in understanding the grounds upon which this submission is based, so soon as it has been held that an alien can commit, and that the appellant did commit, a treasonable act outside the realm. I concur in the conclusion and reasons of that Court upon this point.

Finally (and these are the third and fourth grounds of appeal to the Court of Criminal Appeal) it was urged on behalf of the appellant that there was no evidence that the renewal of his passport afforded him, or was capable of

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affording him, any protection; or that he ever availed himself, or had any intention of availing himself, of any such protection, and if there was any such evidence the issue was one for the jury and the learned Judge failed to direct them thereon.

Upon these points too, which are eminently matters for the Court of Criminal Appeal, I agree with the observations of that Court. The document speaks for itself. It was capable of affording the appellant protection. He applied for it and obtained it, and it was available for his use. Before this House the argument took a slightly different turn. For it was urged that there was no direct evidence that the passport at any material time remained in the physical possession of the appellant, and that upon this matter the jury had not been properly directed by the learned Judge in that he assumed to determine as a matter of law a question of fact which it was for them to determine. This point does not in this form at least appear to have been taken before the Court of Criminal Appeal, and your Lordships have not the advantage of knowing the views of the experienced Judges of that Court upon it. Nor, though the importance of keeping separate the several functions of Judge and jury in a criminal trial is unquestionable, can I think that this is a question with which your Lordships would have had to deal in this case, if no other issue had been involved. For it is clear that here no question of principle is involved. The narrow point appears to be whether in the course of this protracted and undeniably difficult case the learned Judge removed from the jury and himself decided a question of fact which it was for them to decide. This is a matter which can only be determined by a close scrutiny of the whole of the proceedings.

My Lords, this is a task which in the circumstances of this case your Lordships have thought fit to undertake. I do not propose to examine in detail the course of the trial and the summing-up of the learned Judge, though I may perhaps be permitted to say that it was distinguished by conspicuous care and ability on his part. But, having read

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the whole of the proceedings, I have come to the clear conclusion that the learned Judge's summing-up is not open to the charge of misdirection. It may well be that there are passages in it which are open to criticism. But the summing-up must be viewed as a whole and upon this view of it I am satisfied that the jury cannot have failed to appreciate, and did appreciate, that it was for them to consider whether the passport remained at all material times in the possession of the appellant. Upon this question no evidence could be given by the Crown and for obvious reasons no evidence was given by the appellant. It has not been suggested that the inference could not fairly be drawn from the proved facts if the jury thought fit to draw it, and I think that they understood this, and did draw the inference when they returned the general verdict of "Guilty". This point therefore also fails.

My Lords, I am asked by my noble and learned friend Lord Simonds to say that he concurs in the opinion which I have just read.

LORD MACMILLAN: My Lords, I have had the advantage of reading in print the opinion which has just been delivered by the Lord Chancellor. I am in entire agreement with it.

LORD WRIGHT: My Lords, I also have had the same advantage. I fully agree with, and concur in, the opinion which has just been delivered by the Lord Chancellor.

LORD PORTER: My Lords, I have already stated that I agree with your Lordships in thinking that the renewal of William Joyce's passport, obtained on August 24, 1939, was evidence from which a jury might have inferred that he retained that document for use on and after September 18, 1939, when he was proved first to have adhered to the enemy, and therefore I can deal with this part of his appeal very shortly. It is undisputed law that a British subject always, and an alien whilst resident in this country, owes allegiance to the British Crown and, therefore, can be guilty of treason.

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The question, however, remains whether an alien who has been resident here, but leaves this country, can, whilst abroad, commit an act of treason.

The allegiance which he owes whilst resident in this country is recognised in authoritative text-books and the relevant cases to be owed because, as Hale, *Pleas of the Crown*, I, p. 58 says, "the subject hath his protection from the King and his laws". If, then, he has protection he owes allegiance, but the quality of the protection required has still to be determined. On behalf of the appellant it was strenuously contended that unless the alien was enjoying the protection of British law he owed no allegiance. My Lords, I think that this is to narrow the obligation too much. Historically the protection of the Crown through its dispensing power was afforded to the alien in this country earlier than the legal protection which came later. Therefore any protection, whether legal or administrative, would, in my view, be enough to require a corresponding duty of allegiance.

It was said in the second place, however, that in no case could an alien, however long he had been resident here, commit an act of treason whilst he was abroad. This argument again seems to me to limit unduly the extent of his obligation. It is in contradiction of the Resolution of the Judges in 1707, whereby it was declared that if an alien who has been resident here goes abroad himself but leaves his family and effects here under the same protection, the duty (*i.e.*, of allegiance) still continues. This Resolution has been criticised as being merely the opinion of the Judges in consultation with prosecuting counsel, and not given as a decision in any case. The criticism is true, but the Resolution has been repeated in text-book after text-book of high authority, and though not authoritative as a legal decision, it still has the weight of its repetition by great lawyers and the fact that it is nowhere challenged. Foster, Hale, East, Hawkins, Chitty and Bacon all set it out. Blackstone alone omits it, but Blackstone was giving a general view of the laws of England, and an omission

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to set out a particular extension of the general rule is not necessarily a denial of its existence.

Equally the fact that many cases also state only the general rule in cases where no more is required is not a denial of the existence of certain modifications or extensions of it. It is true that even in the case with which the Resolution deals the alien, though absent himself, is vicariously protected by the laws of this country in the person of his family and effects, but it is still no more than protection.

Does, then, the possession of a passport afford any such protection as that contemplated by the rule? I think it does. Even after war is declared, some protection could be afforded to holders of British passports through the protecting Power, and again it would be useful and afford protection in neutral countries. "It will be well to consider what a passport really is", says Lord Alverstone, C.J., in BRAILSFORD, [1905] 2 K. B. 730, at p. 745. "It is a document issued in the name of the Sovereign on the responsibility of a Minister of the Crown to a named individual, intended to be presented to the Governments of foreign nations and to be used for that individual's protection as a British subject in foreign countries", and the late Sir William Malkin in Vol. 49 of the *Law Quarterly Review* (1933), speaks of "The extensive, though perhaps somewhat ill-defined, branch of international law which may be called . . . the diplomatic protection of citizens abroad".

It must be remembered that the matter to be determined is not whether the appellant took upon himself a new allegiance, but whether he continued an allegiance which he had owed for some twenty-four years, and a lesser amount of evidence may be required in the latter than in the former case. I cannot think that such a resident can in war-time pass to and fro from this country to a foreign jurisdiction and be permitted by our laws to adhere to the enemy there without being amenable to the law of treason. I agree with your Lordships also in thinking that if an alien is under British protection he occupies the same position when abroad

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as he would occupy if he were a British subject. Each of them owes allegiance, and in so doing each is subject to the jurisdiction of the British Crown. "The law of nations", says Oppenheim, Vol. I, p. 266 (5th ed.), "does not prevent a State from exercising jurisdiction within its own territory over its subjects travelling or residing abroad, since they remain under its personal supremacy." Moreover, in CASEMENT, 12 Cr. App. R. 99; [1917] 1 K. B. 98, the point was directly decided in the case of a British subject who committed the act of adhering to the King's enemies abroad, and the decision was not seriously controverted before your Lordships.

But, my Lords, though the renewing of a passport might in a proper case lead to the conclusion that the possessor, though absent from the country, continued to owe allegiance to the British Crown, yet in my view the question whether that duty was still in existence depends upon the circumstances of the individual case and is a matter for the jury to determine. In the present case, as I understand him, the learned Judge ruled that in law the duty of allegiance continued until the protection given by the passport came to an end—*i.e.*, in a year's time—or at any rate until after the first act of adhering to the enemy, which I take to be the date of the appellant's employment as broadcaster by the German State on September 18, 1939. The Court of Criminal Appeal take, I think, the same view, but since your Lordships, as I understand, think otherwise, I must set out the facts as I see them. The appellant, admittedly an American subject, but resident within this realm for some thirty years, applied for and obtained a passport, as a British subject, in 1933. This document continued to be effective for five years, and was renewed in 1938 and again on August 24, 1939. Extensions are normally granted for one year, and that given to the appellant followed the normal course. It would, I think, not be an unnatural inference that he used it in leaving England and entering Germany, but in fact nothing further was proved as to the appellant's movements, save that his

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appointment as broadcaster by the German State, dated September 18, 1939, was found in his possession when he was captured, and that at any rate by December 10 he had given his first broadcast. Nothing is known as to the passport after its issue, and it has not since been found.

My Lords, for the purpose of establishing what the learned Judge's ruling was, I think it necessary to quote his own words to the representatives of the Crown and of the prisoner before they addressed the jury. They are as follows: "I shall direct the jury on count 3" (the only material count) "that on the 24th of August, 1939, when the passport was applied for, the prisoner beyond a shadow of doubt owed allegiance to the Crown of this country and that on the evidence given, if they accept it, nothing happened at the material time thereafter to put an end to the allegiance that he then owed. It will remain for the jury, and for the jury alone, as to whether or not at the relevant dates he adhered to the King's enemies with intent to assist the King's enemies. If both or either of you desire to address the jury on that issue, of course, now is your opportunity." After that ruling both counsel proceeded to address the jury, the defence submitting that the appellant had not adhered to the King's enemies, the Attorney-General that he had. No other topic was touched upon by either of them, and in particular no argument was addressed to the question whether the appellant still had the passport in his possession and retained it for use or as to whether he still owed allegiance to the British Crown. After counsel's address to the jury the learned Judge summed up, and again I think I must quote some passages from his observations. One such is: "Under that count (*i.e.*, count 3) there are two matters which have got to be established by the prosecution . . . beyond all reasonable doubt. . . . The first thing that the prosecution have to establish is that at the material time the prisoner, William Joyce, was a person owing allegiance to our Lord the King. Now, [in] my view, I have already intimated . . . as a matter of law is, if you as a jury accept the facts which have been proved in this case beyond contradiction—

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of course you are entitled to disbelieve anything if you wish—if you accept the facts which have been proved and not denied in this case, then at the time in question, as a matter of law, this man William Joyce did owe allegiance to our Lord the King, notwithstanding the fact that he was not a British subject at the material time. Now, members of the jury, although that is a matter for me entirely and not for you, I think it will be convenient if I explain quite shortly the reasons by which I have arrived at that view, partly for your assistance, explanation, and perhaps for consideration hereafter in the event of this case possibly going to a higher Court." Again he said: "None the less I think it is the law that if a man who owes allegiance by having made his home here, having come to live here permanently, thereby acquiring allegiance, as he undoubtedly does, if he then steps out of this realm armed with the protection which is normally afforded to a British subject—improperly obtained, it may be, but none the less obtained . . . using and availing himself of the protection of the Crown in an executive capacity which covers him while he is abroad, then in my view he has not thereby divested himself of the allegiance which he already owed."

Later he says: "So between August 24, and September 18, 1939, armed with a British passport, he had somehow entered Germany. Now, members of the jury, thereafter until July 2, 1940, when his passport ran out, he remained under such protection as that passport could afford him during his stay in Europe." Once again he says: "I do not think I am in any way extending the principles of the law in saying that a man who in this way adopts and uses the protection of the Sovereign to whom he has already acquired an allegiance remains under that allegiance and is guilty of treason if he adheres to the King's enemies. Members of the jury, I accordingly pass from that aspect of the matter; that is my responsibility. I may be wrong; if I am, I can be corrected. My duty is to tell you what I believe to be the law on the subject and that you have to accept from me, provided you

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believe those facts about the passport, going abroad and so forth. If you do not believe that, you are entitled to reject it and say so, because you are not bound to believe everything, but if you accept the uncontradicted evidence that has been given, then in my view that shows that this man at the material time owed allegiance to the British Crown. Now if that is so, then the matter passes into your hands, and from now onwards I am dealing with matters which are your concern and your concern alone, with which I have got nothing to do; they are matters of fact, and the onus of providing those facts is upon the prosecution from first to last, and it never shifts. Now what have they got to prove? They have got to prove that during this period, as I have already indicated, this man adhered to the King's enemies without the realm, namely, in Germany."

The learned Judge then refers to a broadcast, of which there was uncontradicted evidence that it had been made before December 10, 1939, to the prisoner's engagement as a German broadcaster to Britain, and to the prisoner's statement, which was put in evidence by the Crown and from which I need only quote the words: "Realising, however, that at this critical juncture I had declined to serve Britain, I drew the logical conclusion that I should have no moral right to return to that country of my own free will and that it would be best to apply for German citizenship and make my permanent home in Germany." After reading the statement the learned Judge added: "I think that is the whole of the very short material upon which you have to come to the conclusion as to whether or not it is proved to your satisfaction beyond all reasonable doubt that during the period in question this man adhered to the King's enemies, comforted and aided them with intent to assist them, and that he did so voluntarily. Those are the matters which you have to consider."

My Lords, I have read and re-read the summing-up as a whole, and I think I have quoted all the material passages from it. Whether I pay regard to its general import or

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confine myself to the particular passages set out above, I cannot read the words of the learned Judge as doing other than ruling that in law the appellant continued to owe allegiance to His Majesty on September 18, 1939, on December 10, 1939, and indeed until July 2, 1940, and leaving to the jury only the question whether during this period the appellant adhered to the King's enemies. The passage in the summing-up containing the words " provided you believe those facts about the passport, going abroad and so forth " in my opinion merely instructed the jury that they had to be satisfied that the accused man did obtain a renewal of his passport, did go abroad, and did make a statement, but that if they were so satisfied, then in law the prisoner continued to owe allegiance at all material times after he left this country. If it means more than this, I should regard it as a totally inadequate direction as to what must be proved in order to show that the allegiance continued after he left this country. But I do not think it does mean more than I have indicated.

As I have stated, the renewal of the passport on August 24, 1939, was, in my view, evidence from which a jury might infer the continuance of the duty of allegiance. What the prosecution have to show is that that duty continued at least until September 18. The learned Judge, as I see it, regards the renewal as proving conclusively that the duty continued until the passport ceased to be valid, unless some action on the part of the Crown or the appellant was proved which would put an end to its protection. The Court of Criminal Appeal, in my opinion, took the same view. Their words are: " We have to look at the evidence in this case and upon that evidence to decide whether the trial Judge was right or wrong in holding as a matter of law that on September 18, 1939, and between that date and July 2, 1940, this appellant did owe allegiance to the King. Now we agree with Tucker, J., that the proper way of approaching that question is to see whether anything had happened between August 24 and September 18 to divest the appellant

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of that duty of allegiance which he unquestionably owed at the earlier of those dates." This ruling, as I see it, can only mean that the appellant's duty of allegiance remained in force until July 2, 1940, unless it was shown by him or on his behalf that something had occurred to put an end to that duty. It puts the onus on him to show some action terminating that obligation. The passport was never found again, and he may have used it only to gain admittance to Germany and may then have discarded it. Indeed, his statement, if believed, indicates that this was his object, and the mere fact that the renewal for a year proves nothing, since, as was proved in evidence, that is the normal period of extension. There is no evidence that he kept it for use on or after September 18.

If I thought that the obtaining of the passport on July 24 proved, in law, that the appellant retained it for use at least until September 18, unless he was shown to have withdrawn his allegiance, I should accept this ruling. But I do not think it correct. It could only be supported on the ground that allegiance continues until the appellant shows that it is terminated. The Attorney-General supported this contention by a reference to Archbold's *Criminal Pleading and Practice* (31st ed.) (1943), at p. 330, where it is stated that if a matter be within the knowledge of the accused and unknown to the Crown the onus of proof is cast upon the former. For this proposition the case of TURNER (1816), 5 M. & S. 206, is said to be an authority. But that case has been explained as dependent upon the special provisions of the game laws and as being, therefore, not of general application. The true principle is, I think, set out in Phipson on *Evidence* (8th ed.), p. 34, and Best on *Evidence* (12th ed.), p. 252, and is explained by Holroyd, J. (himself a party to the judgment in TURNER (*supra*)) in BURDETT (1820), 4 B. & A. 95, at p. 140. The rule in question, he says, "is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant of the crime with which he is charged; but when such proof has been given it is a rule

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to be applied in considering the weight of evidence against him, whether direct or presumptive, when it is unopposed, unrebutted, or not weakened by contrary evidence which it would be in the defendant's power to produce, if the fact directly or presumptively proved were not true".

If this be the true principle, the failure of the prisoner to give evidence as to his dealing with the passport goes to increase the weight of the evidence against him, but does not make the evidence of his applying for and receiving it proof conclusive in law that he continued to retain it for use or at all. That he received it may be some proof to go to the jury that he retained it, but it is no more; it is not a matter upon which a Court is entitled to rule that a jury must draw the inference that he retained his allegiance. Indeed, at one point in his argument the Attorney-General used language which, in my view, accepted this as the true principle when he said: "I put the passport merely as evidence of the existence of protection. If he" (*i.e.*, the accused) "discarded it on his return that might make a difference." To this observation I would merely add that the renewal of the passport was at best but some evidence from which a jury might infer that the duty of allegiance was still in existence. Unless, however, the accused man continued to retain it for use as a potential protection, the duty of allegiance would cease, and it was for the jury to pronounce upon this matter.

I do not understand your Lordships to reply upon the proviso to section 4 of the Criminal Appeal Act, nor do I think it could be said that no substantial miscarriage of justice had occurred, if I am right in considering that the matter should have been left to the jury. The test has been laid down by your Lordships' House to be whether a reasonable jury properly directed must have come to the same conclusion. In the present case a reasonable jury properly directed might have considered that the allegiance had been terminated. Against the mere receipt of the passport there has to be set the fact that its possession was at least desirable if not necessary to enable the accused man to proceed to

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Germany from this country, the fact that it was not found in his possession again or anything further known of it, his statement as to his intention of becoming naturalised in Germany and his acceptance of a post from the German State. At any rate these were matters for a jury properly directed to consider. They were not directed on them and, as I have stated, in my view they were told that the matter was one of law and not for them.

My Lords, the question of the extent to which an alien long resident in this country continues to owe allegiance after he has left it, and whether the request for, and acceptance of, a passport makes the duty of allegiance still owed until the protection of that passport ceases by effluxion of time or at least for some period after its issue is, and has been certified to be, a point of law of exceptional public importance. One matter to be decided in solving that question is the boundary line between the functions of a Judge and those of a jury. Apart from this, the principle that questions which are rightly for the jury should be left to them and that a proper direction should be given is, as I think, also of great public importance. The one matter concerns this country only in the exigencies of war, though then no doubt it is of vital importance; the other is a necessary element in the true administration of the law in all times of peace and war. If the safety of the realm in war-time requires action outside the ordinary rule of law, it can be secured by appropriate measures such as a Defence of the Realm Act, but the protection of subject or foreigner afforded through trial by jury and the due submission to the jury of matters proper for their consideration is important always, but never more important than when the charge of treason is in question.

For these reasons I would myself have allowed the appeal.

Solicitors: Ludlow & Sons, for the appellant.

BEFORE

MR. JUSTICE HUMPHREYS, MR. JUSTICE LEWIS AND MR. JUSTICE HENN COLLINS.

1946.
24 *January.*

HENRY WILLIAM BATEMAN.

Witness—Hostility—Cross-examination by Judge—Observations on Treatment of Witnesses.

The observations of the Court in GILSON AND COHEN (1944), 29 Cr. App. R. 174, at p. 181, and CAIN (1936), 25 Cr. App. R. 204, at p. 205, with regard to the cross-examination of a prisoner giving evidence by the presiding Judge: "There is no reason why the Judge should not from time to time interpose such questions as seem to him fair and proper. It is, however, undesirable that the Judge should proceed . . . long before the time [has] arrived for cross-examination to cross-examine [the prisoner] with some severity. . . . It is undesirable that during an examination-in-chief the Judge should appear to be not so much assisting the defence as throwing his weight on the side of the prosecution by cross-examining a prisoner", should be extended so as to apply to the case of a witness, whether called for the prosecution or the defence.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on November 9, 1945, of warehouse-breaking and of causing grievous bodily harm and was sentenced by the Commissioner to eighteen months' imprisonment.

At about 3.30 p.m. on Saturday, August 18, 1945, a warehouse at North Harrow was broken into. A van, which was the property of the appellant, was used in connection with the commission of the crime and was deliberately driven on to a woman who got in front of it and tried to interfere, with the result that she was knocked down and injured. One of the main issues in the case was whether the appellant was driving the van at that time. A witness called by the prosecution, who lived about twelve miles from the scene of the crime, said that the appellant had visited her house on

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the particular afternoon, but that she could not say at what time he had been there, as "she was no good at times". She was then treated by the Commissioner as hostile and cross-examined by him, and subsequently by counsel for the prosecution, on the basis that she was not trying to tell the truth. A similar course was adopted in the case of another witness for the prosecution who gave similar evidence.

Alban Gordon, for the appellant.

The witnesses should not have been treated as hostile. There was no indication that they were not trying to tell the truth. All they had said was that their memory was bad with regard to times. Similar treatment of a prisoner giving evidence-in-chief was criticised by this Court in CAIN (1936), 25 Cr. App. R. 204, at p. 205, and in GILSON AND COHEN (1944), 25 Cr. App. R. 204, at p. 205. Further, the summing-up was unsatisfactory, and several questions of fact were not dealt with accurately.

Henry Elam, for the Crown.

The prosecution did not feel justified in treating any of the witnesses as hostile, and did not apply to the Judge that they should be so treated. Any questions put by the prosecution in cross-examination, which may have suggested that the witnesses were not trying to speak the truth, were put only after the Judge had himself treated the witness in the manner of which complaint is made. It must be conceded that the treatment of these witnesses by the Judge was not satisfactory, but the evidence in the case was so overwhelming that the jury cannot have been influenced by this matter, nor is there any likelihood that, apart from this matter, they would have acquitted the appellant.

HUMPHREYS, J.: The evidence against the appellant was that the van which was engaged in the warehouse-breaking was his van, and that he had been driving it on the morning of the day in question. A witness, Mrs. Hull, was called to prove that at 5.30 that afternoon—that is, just about two

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hours after the offence—the van was again seen at Marlborough Yard, Holloway, and that the driver of that van, and the man apparently in charge of it, was the appellant.

On August 21 the appellant was questioned by the police. He stated that he was with his brother-in-law, a man named Parkin, all the afternoon playing cards at a house, No. 15 Kingsdown Road, Holloway, and said: "While we were there playing cards, my wife came in and told me that the van had been stolen. That is the first I knew, and so I went and reported it to the police." He said that the last time he had seen the van was at 12.30 that day. He said, further, that the persons who were playing cards were a Mrs. Smith, Mr. and Mrs. O'Brien and a man named Field and his wife. With regard to Wilkinson, who was convicted of the warehouse-breaking together with the appellant, he said: "I know him perfectly well, but I did not see him at any time on the Saturday." It was an unfortunate coincidence perhaps that somebody whom he knew quite well is clearly identified as being connected in this crime.

The next thing that happened, so far as we can judge from the transcript of the shorthand notes, was that the police interviewed those persons with whom he said he had been playing cards to see whether it was true, according to their story, that he was with them all the afternoon, and it may be observed that the distance given by the police between Kingsdown Road, Holloway, and the place where the warehouse was broken into, was something like twelve miles. The police came back to the appellant and said: "We have seen the people who were playing cards; they all say you were not there on the Saturday." Whether that was true or not, we have no knowledge, because we do not know what statements were made to the police, and, of course, they would not be evidence. Then the appellant answered: "All I can say is that they are mistaken, because I was there all the afternoon." The police continued their inquiries, and at 9 o'clock at night arrested him and charged him with these offences. The evidence of the police was, again, that

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while being taken to the police station the appellant made this statement: "Parkin knows nothing about it; I was in it, but I saw no cigarettes." If that statement was made, it seems to follow that no jury would care very much about any other evidence, unless it was extraordinarily cogent and satisfactory evidence, because that statement amounted to a confession. The combination of the facts that the van belonging to the appellant was used for the purpose of committing the crime, that the appellant first said he was not there, and then afterwards, with the laudable desire of exculpating his brother-in-law, Parkin, said "I was there; I was in it but I did not in fact see any cigarettes", coupled with the evidence of Mrs. Hull that the appellant was undoubtedly with that van, presented a case which might reasonably be described as conclusive, and the prosecution might well have been satisfied with that case. But they were not, for some reason or other. I pause here to observe that at the trial that vital statement made by the appellant was given in evidence by the police, and cross-examining counsel, on his instructions, merely said: "I suggest to you that you misheard him, that he did not say 'I was in it', and that what he said was 'If I was in it, I saw no cigarettes'." When the appellant gave evidence on oath, he said: "That is what in fact I said to the police, 'If I was in it, I saw no cigarettes'." In the view of this Court it does not make the least difference whether he said "If I was in it" or "I was in it", because either statement is unintelligible as a statement unless it was a confession that he did know all about this matter.

The matter which has troubled the Court and in regard to which leave to appeal was given is this. For some reason which we do not understand the three women at the card party, Mrs. Smith, Mrs. O'Brien and Mrs. Field were called by the prosecution as witnesses. Mrs. Field gave no material evidence. Her evidence was: "I went upstairs to lie down, and I did not see the appellant there at any time. I should not have seen him because I was upstairs." So we can leave her out. Mrs. Smith was then called, and we are

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told by counsel for the prosecution that she was called solely to give evidence that on the following day the appellant said to her: "I want you to come and give evidence that I was playing cards here right away from twelve or half-past in the middle of the day all the afternoon." If so, it is a great pity that the examination-in-chief of Mrs. Smith was not confined to that matter. The evidence that the appellant had attempted to suborn the witness to commit perjury by saying that he was there the whole afternoon, when she had no reason to believe that anything of the sort was true, was not objected to and probably would not have been open to objection. Mrs. Smith was asked a number of questions about what time the appellant was there. The witness, with perfect frankness so far as we can judge, started by saying: "It is no use asking me about times. I am no good at times. I do not know what the times were." She also said: "I cannot even tell you the day because I am not good at dates." The day, however, could be fixed by other people who said: "It was the day before this man was arrested", or something of that sort, and she said: "Very well, if the day was Saturday, there was a Saturday, I remember, when we were playing cards and when the appellant came into our house, No. 15." She was asked: "What time was it?", and she said: "I do not know. All I can tell you is that the time we usually have tea is between five and six, and it was before we had tea that afternoon", leaving it, of course, quite vague whether they had tea that afternoon at five or between five and six, or before or after or at any other time. That was completely unsatisfactory evidence, one would have thought. For some reason the Commissioner, who was presiding at the trial, formed the opinion that the witness could give much more satisfactory evidence if she liked, and he cross-examined her and treated her as if she were a thoroughly disreputable liar. It must not be forgotten by those who preside at criminal trials that witnesses, whether called for the prosecution or the defence, are entitled to be treated with courtesy and politeness

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unless and until they show some symptom of refusing to assist the Court by giving evidence promptly and properly. With all due respect to the Commissioner, it is not the duty of any presiding Judge, as soon as a witness says: "I cannot tell you with accuracy what time something happened", to say: "Oh, yes, you can. You be careful", or anything designed to force the witness to say something which she really cannot say. The result was that when that cross-examination was taken up to some extent by counsel for the prosecution, this unfortunate woman was induced to give about seven or eight different times as being very probably the times when the appellant went there. Mr. Gordon, who appeared for the appellant, has told us that in the result—and this agrees with our own reading of the transcript—the witness showed herself to be the sort of woman who, if sufficiently badgered, would say anything. It means, not that the woman was not trying to tell the truth, but that she was a person who could not fix times and whose evidence was valueless. It is not necessary to deal with the case of Mrs. O'Brien, except to say that she was treated in much the same way. It ought to be said that Mr. Elam, who appeared for the prosecution, did not start the attack on this woman. It was started by the Commissioner. Judges are entitled, if they form the opinion that a witness is not trying to help the Court, to do what counsel cannot do, and say: "You behave yourself and tell me the truth." It is sometimes very useful to be able to say that. Sometimes it pulls a witness together and makes him say what is the truth, but, of course, it must not be done until the witness has given some indication that he or she is not trying to tell the truth. The mere fact that a witness cannot fix a time is no reason for treating her in that way, and why it was thought necessary so to treat the witnesses in this case is a little difficult to understand.

The observations which were made in GILSON AND COHEN (1944), 29 Cr. App. R. 174, at p. 181, in which the Court adopted the language of a previous decision, CAIN (1936),

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25 Cr. App. R. 204, at p. 205, are apposite in this case. The observations were to this effect: "There is no question why the Judge should not from time to time interpose such questions as seem to him fair and proper. It was, however, undesirable that . . . the Judge should proceed, without giving much opportunity to counsel for the defence to interpose, and long before the time had arrived for cross-examination, to cross-examine [the witness] with some severity. The Court agrees with the contention that that was an unfortunate method of conducting the case. It is undesirable that during an examination-in-chief the Judge should appear to be not so much assisting the defence as throwing his weight on the side of the prosecution by cross-examining a prisoner." We would adopt those observations and apply them to any witness, whether called by the prosecution or the defence.

The question of treating a person as a hostile witness is not left at large, but is prescribed by statute, namely, the Criminal Procedure Act, 1865, often referred to as Denman's Act, a very well-known statute. It first of all confirmed what had always been the law, that a party calling a witness is not entitled to contradict that witness. He must leave the witness to tell his story. Section 3 provides: "A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall, in the opinion of the Judge, prove adverse, contradict him by other evidence, or, by leave of the Judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement." Mr. Elam has told us that he did not feel he was justified in asking the Judge to say that Mrs. Smith was a hostile witness and that is why he did not ask him, and it is true

to say he only put some leading questions himself following on the learned Judge.

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We have thought it right to make these observations in the interests of the trial of criminal cases generally, because it is so necessary for the doing of justice that witnesses, whether they are for the prosecution or for the defence, should be allowed to tell their stories, and that then it should be left to the jury, subject, of course, to the comments of the presiding Judge, to say whom they believe.

On the question whether we can disregard these unfortunate incidents with regard to Mrs. Smith and Mrs. O'Brien, we take the view that the whole of their evidence was perfectly unreliable, and it is probable that the jury so regarded it. That being so, it may be eliminated, and the rest of the case is so conclusive and so strong that we feel it would be wrong to say that the jury might have found the appellant Not Guilty if it had not been for that incident. On the whole we think this is a case in which, if it is necessary to put it that way, we can apply the proviso to section 4 of the Criminal Appeal Act, 1907, and say that there certainly has been no miscarriage of justice. For that reason the appeal is dismissed.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE LEWIS AND MR. JUSTICE DENNING.

HARRY JOHN McBAIN.

1946.
18 *February.*

Sentence—Leave to Appeal with View to Possible Increase—Alteration in Practice of Court—No Warning to be Given to Appellant.

Where leave to appeal against sentence is given with a view to a possible increase, the practice of the Court under

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which hitherto warning has generally been given to the appellant that, if he persists in his appeal, the Court may increase his sentence will no longer be followed, and in future no such warning will be given in such a case.

Appeal against sentence.

The appellant was convicted at the Central Criminal Court on December 7, 1945, of housebreaking and larceny and was sentenced by the Recorder to three years' penal servitude.

No counsel appeared on either side.

THE LORD CHIEF JUSTICE: The appellant entered some flats at Earl's Court and other places and stole goods to the value of £300. He was seen by police officers to leave a flat in suspicious circumstances. When the police approached him he produced a revolver, which was heard by a police officer to click, but fortunately there was no discharge. By the use of this revolver the appellant managed to escape and was not arrested till later.

The appellant was convicted on the clearest possible evidence, and was sentenced to three years' penal servitude. He had not been convicted before. He applied for leave to appeal against both conviction and sentence. The Court refused his application for leave to appeal against conviction, but gave him leave to appeal against sentence for one reason only, in order that it might consider whether or not it should substantially increase his sentence.

Hitherto, when this Court has considered an application for leave to appeal against sentence, and has formed the opinion that the sentence was not severe enough, it has generally warned the applicant that if he persists in his appeal the Court may increase his sentence. This Court no longer intends to take that course. The Criminal Appeal Act, 1907, does not require it, but by section 4 (3) provides that where a prisoner applies for and obtains leave to appeal against his sentence, this Court, if it thinks that a different

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sentence should have been passed, shall pass such sentence as it thinks ought to have been passed, whether greater or less than the sentence actually passed. In the state of crime in this country the time has now come when sentences must be severe, and where a prisoner appeals against sentence this Court will not shrink from increasing the sentence if it thinks it right to do so.

In this case the Court has had very great doubt whether it is not its duty substantially to increase the sentence which was passed. One thing only has saved the appellant from having his sentence increased to a considerably longer term of penal servitude. If he had gone to the flat armed with a revolver so that he was committing housebreaking being armed at the time, the Court would have regarded a sentence of three years' penal servitude as wholly inadequate and would have doubled it. As it is, it appears that the appellant did not go to the flat armed, but stole a revolver when he was there, and it is not clear whether the revolver was loaded or not. None the less, it was a very serious offence and the Court has considered long and earnestly whether it ought not to increase the sentence. But taking into account the facts that he did not go to the flat armed and that he has not previously been convicted, the Court has come to the conclusion that the sentence shall stand, though in its opinion he received a lenient sentence for a very gross and grave crime. The appeal is dismissed, and the sentence will run from to-day.

Appeal dismissed.

INCREASES OF SENTENCE.

The Court increased sentences passed on appellants in the following cases:—

On February 18, FREDERICK WILLIAM WHITE, sentenced at Lancashire Quarter Sessions to two years' imprisonment, increased to four years' penal servitude.

INCREASES OF SENTENCE.

On February 25, NORMAN ALEXANDER WILLOCK, sentenced at Plymouth City Quarter Sessions to three years' penal servitude, increased to five years' penal servitude.

On March 11, REGINALD HERBERT HATTON POTTER, sentenced at Leicester City Quarter Sessions to three years' penal servitude, increased to four years' penal servitude; JOSEPH EDWARDS, sentenced at Staffordshire Quarter Sessions to three years' penal servitude, increased to five years' penal servitude; ERNEST JOSEPH JONES, sentenced at Birkenhead City Quarter Sessions to three years' penal servitude, increased to five years' penal servitude.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE SELLERS.

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MARIAN GRONDKOWSKI.
HENRYK MALINOWSKI.

Procedure—Persons Jointly Indicted—Separate Trials—Matter for Discretion of Judge—When Court of Criminal Appeal will Interfere.

There is no rule of law that, where an essential part of one prisoner's defence amounts to an attack on a co-prisoner, there must be separate trials. This is a matter which a Judge should take into account in deciding whether to order separate trials or not, but the decision is a matter for the discretion of the Judge, who has to consider the interests of justice as a whole.

The Court of Criminal Appeal will interfere with the discretion of a Judge in this matter only where it is shown that the exercise of the discretion has resulted in a miscarriage of justice—in other words, that improper prejudice has been created either by a separate or a joint trial.

GIBBINS AND PROCTOR (1918), 13 Cr. App. R. 134, approved.
BARNES AND RICHARDS (1940), 27 Cr. App. R. 154, explained.

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Appeals against conviction.

The appellants were convicted at the Central Criminal Court on February 13, 1946, of murder and were sentenced by Croom-Johnson, J., to death.

The case for the prosecution was that the appellants were engaged in a common design to rob the dead man, who was found in a motor car on the morning of November 1, 1945, shot through the head. At the trial applications were made to the Judge for separate trials, but were refused. At the trial each of the appellants gave evidence blaming the other for the killing.

Melford Stevenson, K.C., and *S. L. Langdon*, for the appellant Grondkowski.

The summing-up was unsatisfactory in that the Judge failed to deal with evidence which went to dissociate the appellant, Grondkowski, from any common design to offer violence, if necessary, to effect the robbery, or even to rob.

J. D. Casswell, K.C., and *Victor Durand*, for the appellant Malinowski.

The joint trial in this case constituted a miscarriage of justice. Separate trials should have been ordered, as it was plain from the outset that an essential part of the defence of the appellant Malinowski constituted an attack on his co-prisoner. Quite recently, in BARNES AND RICHARDS (1940), 27 Cr. App. R. 154, the Court laid down that in such circumstances separate trials should be ordered. That decision has never been disapproved since, and must be taken as overruling earlier authorities such as GIBBINS AND PROCTOR (1918), 13 Cr. App. R. 134, which left the matter to the discretion of the Judge at the trial. The Judge in the present case should have followed the rule laid down in BARNES AND RICHARDS (*supra*). In fact, he gave no reason for exercising his discretion in favour of a joint trial.

E. Anthony Hawke, for the Crown.

The question of joint or separate trial was in the discretion of the Judge, and the decision to that effect in GIBBINS AND

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PROCTOR (*supra*) was not overruled by BARNES AND RICHARDS (*supra*). The latter authority merely indicated the kind of matters which it might be proper for the Judge to consider.

At the conclusion of the arguments the Lord Chief Justice announced that both appeals would be dismissed, and that the Court would give their reasons in writing at a later date.

Cur. adv. vult.

Mar. 25.—The following judgment of the Court was read:

THE LORD CHIEF JUSTICE: In dismissing this appeal the Court intimated that they would put into writing their judgment with regard to the ground of appeal raised by Mr. Casswell on behalf of the appellant Malinowski that he ought to have been granted a separate trial. This was asked for at the trial but refused by Croom-Johnson, J.

When an application is made by a prisoner indicted jointly with another that he should be tried separately, it must be made at the outset of the trial, though not necessarily before plea, and the Judge can only act upon the material then before him, which ordinarily will be the depositions and exhibits. In the present case, which was one of murder, it was clear from this material that the case to be presented by the prosecution was that the two prisoners set out together to rob the dead man and that the jury would be invited to find a common intention not only to rob but to overcome resistance, if offered. It further appeared that both prisoners admitted that they were present at the killing which was effected by shooting with a revolver; that they afterwards stripped the dead body of the deceased's property; and that they then went off with the booty, which they shared, and stayed together in the same lodging where the weapon was afterwards found in the room in which they were living. Each prisoner sought to put the blame for the actual shooting on the other and each denied that he intended to offer violence or even to rob. There was ample evidence from which the jury could infer a common intention to rob

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and to use such violence or other means as was necessary to effect that purpose. Which of the two actually fired the fatal shot was therefore immaterial, but of course the jury might have found that one or other was present with no intention of robbing the deceased but merely as a peaceful passenger in the car.

Prima facie it appears to the Court that, where the essence of the case is that the prisoners were engaged on a common enterprise, it is obviously right and proper that they should be jointly indicted and jointly tried, and in some cases it would be as much in the interest of the accused persons as of the prosecution that they should be. Suppose, for instance, that the defence of one was that he or she was acting under the positive duress of the other. It would be obviously right that they should be tried by the same jury, who might see in one prisoner a harmless or nervous-looking little man or woman, and in the other a savage brute whom they might deem capable of forcing his co-prisoner against his will into assisting in a crime. Another instance would be the case of an indictment against husband and wife; the latter is no longer presumed in law to be acting under the coercion of her husband, but may nevertheless prove that she was. It would be very desirable, not only in the interest of the prisoners, but of justice, that the same jury should try them both, and it is by no means beyond the bounds of possibility that, so far from finding that the wife acted under the coercion of her husband, the jury might find that the husband was coerced by the wife, and if the same jury ought to try them, it would be absurd to say that they should be tried separately.

But it is said that there is now a rule of law that, where it appears that the essential part or an essential part of one prisoner's defence is or amounts to an attack upon another prisoner, a separate trial should take place. This is said to be the result of BARNES AND RICHARDS (1940), 27 Cr. App. R. 154, where Lord Hewart, Chief Justice, in a judgment which had not been reserved, used the words we have just quoted

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in giving the judgment of the Court. In our opinion, that case is not to be read as laying it down that, wherever it appears that one prisoner is going to lay the blame on the other, or another, there must be separate trials. The law is, and always has been, that this is a matter of discretion for the Judge at the trial. The Court so stated the law in this very case, and quite recently in YOUTH, [1945] W. N. 27, the Judicial Committee said that the question of joint or several trials had always been left to the discretion of the presiding Judge. The discretion, no doubt, must be exercised judicially, that is, not capriciously. The Judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that " the interests of justice " means only " the interests of the prisoners ". If once it were taken as settled that every time it appears that one prisoner as part of his defence means to attack another, a separate trial must be ordered, it is obvious there is no room for discretion and a rule of law is substituted for it. There is no case in which this has ever been laid down, and in the opinion of the Court it would be most unfortunate and contrary to the true interests of justice if it were. The matter was well and, as we think, quite correctly dealt with in GIBBINS AND PROCTOR (1918), 13 Cr. App. R. 134, where Darling, J., delivering the opinion of the Court, said at p. 136 : " The rule is, that it is a matter for the discretion of the Judge at the trial whether two people jointly indicted should be tried together or separately. But the Judge must exercise his discretion judicially. If he has done so this Court will not interfere, but that is subject to this qualification. If it appeared to this Court that a miscarriage of justice had resulted from the prisoners being tried together it would quash the conviction. Here it is clear that Mr. Justice Roche exercised his discretion; he separated the defences carefully, pointing out what was evidence against one prisoner and not against the other. It is not enough to say that counsel could have defended them more easily if they had been tried separately.

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There is no ground for thinking that there was any miscarriage of justice. There may have been many things made clear to the jury which would not have been made clear if the prosecution had been embarrassed by having to deal with the two cases separately. The whole story was before the jury of what went on in the house where the two appellants lived together. There is no ground for thinking that either of them was improperly prejudiced by their being tried together." In our opinion, the Court in BARNES AND RICHARDS' CASE (*supra*) is not to be taken as meaning more than that an attack by one prisoner on another is a matter which the Court should take into account in considering whether to grant a separate trial, not that in those circumstances it is bound to do so.

The dearth of authority on the subject in former days is probably due to the fact that the granting or withholding of a separate trial has always been treated as discretionary. In a passage in Kelyng, J., paragraph 8, under the heading "Treason", it is stated that, where prisoners sever their challenges, the panel may be severed, which means that the Court could try them separately. So from that it appears that if the Court of its own motion and not on the motion of the prisoners orders a separate trial, it is no ground for arresting judgment. AHEARNE (1852), 6 Cox 6, a case in the former Irish Court of Criminal Appeal, shows that the Court has a discretion to allow a case to proceed against one of several conspirators although the others, who have appeared and pleaded, have not been tried. The Court refused to arrest the judgment, holding apparently that it was within the discretion of the Judge to allow the case to proceed against one prisoner only. We may also refer to BRADLAUGH AND OTHERS (1883), 15 Cox 217. There, the defendant, who was indicted along with two others for publishing a blasphemous libel, applied for a separate trial on the ground that his co-defendants had already been convicted and were serving a sentence for publishing a similar libel in another number of

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the same newspaper, and that this would prejudice him in his defence, especially as he desired to call them as witnesses. Lord Coleridge, Chief Justice, granted a separate trial because he thought there was a possibility of prejudice resulting to the defendant if he were tried along with two persons already convicted for substantially the same offence. We mention this only as illustrating another ground which a Judge may properly take into account when dealing with such an application. The real test, after all, which must be applied by a Court of Criminal Appeal on a matter which is essentially one of discretion is, has the exercise of the discretion resulted in a miscarriage of justice? If improper prejudice has been created, whether by a separate or by a joint trial, for, as we showed at an earlier stage of this judgment, prejudice might be caused to one prisoner by ordering a separate trial on the application of the other, this Court will interfere, but not otherwise. In this case we are satisfied that there has been no miscarriage, and this ground of appeal therefore fails.

Appeal dismissed.

IN THE HOUSE OF LORDS.

BEFORE

VISCOUNT SIMON, LORD MACMILLAN, LORD PORTER, LORD SIMONDS AND LORD DU PARCQ.

LEONARD HOLMES.

1946.
25 *March.*
5 *April.*
6, 7, 8, 9, 10 *May.*
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Murder—Manslaughter—Provocation—When Issue should be Left to Jury—Intention to Kill or Cause Grievous Bodily Harm—Adultery—Confession by Spouse—Provocation by Words Only.

When the question arises whether what would otherwise be murder may be reduced to manslaughter on the ground of provocation, if there is no sufficient material, even on a view of the evidence most favourable to the prisoner, for a reasonable jury to form the view that a reasonable person so provoked could be driven, through transport of passion and loss of self-control, to the degree and method and continuance of violence which produces the death, it is the duty of the Judge as a matter of law to direct the jury that the evidence does not support a verdict of manslaughter. If, on the other hand, the case is one in which the view might fairly be taken (a) that a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to use the violence with fatal results; and (b) that the prisoner was, in fact, acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict.

The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary lack of self-control, whereby malice, which is the formation of an intention to kill or to cause grievous bodily harm, is negatived. Where, therefore, the provocation inspires an actual intention to kill or to inflict grievous bodily harm, only one special exception has been recognised as reducing murder to manslaughter—namely, where one spouse actually finds the other in the act of adultery.

A sudden confession of adultery without more can never constitute provocation sufficient to reduce murder to manslaughter. In no case can words alone, save in circumstances of a most extreme and exceptional character, so

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reduce the crime, and when words alone are relied on in extenuation, it is the duty of the Judge to consider whether they are of this violently provocative character, and if he is satisfied that they cannot reasonably be so regarded, to direct the jury accordingly.

Dictum of Blackburn, J., in ROTHWELL (1871), 12 Cox C. C. 145, at p. 147, and any cases which seem to accept or apply it, not accepted.

Appeal by the prisoner from an order of the Court of Criminal Appeal dismissing an appeal against conviction before Charles, J., at Nottinghamshire Assizes on February 28, 1946, of murder.

The following statement of facts is taken from the speech of Viscount Simon.

The appellant killed his wife, according to his own evidence, on the night of Sunday or in the early hours of Monday, November 18 or 19, 1945, in the kitchen of the house where they lived. On the previous Saturday he had telegraphed to a Mrs. X, who lived in a different part of the country and with whom he admitted that he had previously had sexual relations, that she might expect him on the Sunday or Monday; he travelled on the Monday to Mrs. X and told her that his wife had left him. In fact, his wife's dead body was discovered next day in the room where he had killed her. She had received a severe wound on the head caused by the hammer-head for breaking coal which was close to his hand, and she had many bruises on her body, but the final cause of death was manual strangulation. The appellant's story was that there was a quarrel between them on the Saturday night, originating from some persons winking in the direction of his wife in a public house that evening; he said that he had entertained suspicions of his wife's conduct with regard to other men in the village, and that there had been some suggestion made to him with regard to her and his own younger brother. The quarrel, he said, culminated in his wife's saying: "Well, if it will ease your mind, I have been untrue to you," and she went on:

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"I know I have done wrong, but I have no proof that you haven't—at Mrs. X's." "With this", the appellant's statement continued, "I lost my temper, and picked up the hammer-head and struck her with the same on the side of the head. She fell on her knees and then rolled over on her back, her last words being, 'It's too late now, but look after the children". She struggled just for a few moments and I could see she was too far gone to do anything. I did not like to see her lay there and suffer, so I just put both hands round her neck until she stopped breathing, which was only a few seconds." In the witness-box the appellant was asked in cross-examination: "When you put your hands round that woman's neck and gave pressure through your fingers, you intended to take your wife's life, did you not?" and he answered "Yes".

P. E. Sandlands, K.C., and *Elizabeth K. Lane*, for the appellant:

A defence of provocation was raised which the Judge did not put to the jury and the jury were not allowed to consider that defence, the Judge directing them, if they convicted, to convict of murder. Further, the Judge misrepresented the defence to the jury by directing them that the provocation relied upon by the defence was the just accusation by the appellant's wife that he had been guilty of adultery. Where a defence of provocation is raised, if there is any evidence whatsoever in support of it, it is the duty of the Judge to direct the jury to consider that defence. MANCINI *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 28 Cr. App. R. 65; [1942] A. C. 1, gives a general definition of what constitutes provocation sufficient to reduce a felonious killing from murder to manslaughter. Even on the authority of earlier cases such as JONES (1908), 72 J. P. 215, ELLOR (1921), 85 J. P. 107, and ROTHWELL (1871), 12 Cox 145, there was in the present case evidence of provocation for the jury to consider. Where there is evidence of a provoked attack made by one person upon another which consists of

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more than one blow or other act, it is a question of fact for the jury whether such blows or other acts form part of the same attack or whether, if they do not, the later attacks were due to the same provocation. Finally, it was improper for the Judge to direct the jury not to believe everything the appellant said against his wife, especially in circumstances where the prosecution accepted and relied upon his admission that he was the person who killed the deceased, there being no other evidence of this.

Rodger Winn for the Crown was not called on to argue.

At the conclusion of the argument the Lord Chief Justice announced that the appeal would be dismissed, and that the Court would give their reasons later.

Cur. adv. vult.

April 5.—The judgment of the Court (THE LORD CHIEF JUSTICE, WROTTESLEY and CROOM-JOHNSON, JJ.), was read by WROTTESLEY, J.: The appellant was tried and convicted before Charles, J., at Nottingham Assizes of the murder of his wife. He applied for leave to appeal against this conviction and the Court treated this application as the actual appeal.

His wife's body was discovered in the house in which they both lived on Tuesday, November 20, 1945. The appellant had recently been demobilised and returned to his home. The medical evidence, which was not challenged, showed that the dead woman had received a wound on the head, which might have been caused by the hammer-head found in the hot cupboard near the dead body. There were also various bruises on the body, caused apparently in a struggle, but she had actually died from being strangled by hand. It is clear that she had been lying in the cottage in front of the fire-place since the previous Sunday night or early Monday morning. During the interval the appellant had left the house and gone to the house of a woman with whom he had been intimate during the last two years and to whom he told a story that his wife had left him. The opinion of the doctor

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who conducted the post-mortem examination was that she had first been partially strangled, then struck on the side of the head, so as to split the forehead, by a weapon such as the hammer-head and finally finished off by strangulation. On Wednesday, November 21, the appellant was stopped by the police, who were inquiring into the matter, and to them he said: "All right, I know what you want me for," and later after caution: "Yes, it happened on Sunday night. It was all over something she said. I hit her with a hammer-head from out of the hot cupboard", and when charged with murder said: "There is only one answer to the charge, I admit it". Next day he made a statement in which he related the circumstances under which he had killed the woman. In this statement, after complaining that he had seen some persons winking in the direction of his wife in a public house that evening, and after saying that he had always had slight suspicions with regard to other men in the village, and that there had been suggestions to him concerning his own younger brother, he went on to say that with all this at the back of his mind a quarrel broke out when they got home on the Sunday night. A heated argument occurred, in the course of which he alleged that she said: "Well, if it will ease your mind, I have been untrue to you", and went on: "I know I have done wrong, but I have no proof that you haven't at Mrs. X's" (Mrs. X was the woman to whom he had gone after killing his wife); "admitted, she's been a good friend to you and to me by having me at their house". With this, the appellant's statement continues, "I lost my temper and picked up the hammer-head from the hot box and struck her with the same on the side of the head. She fell to her knees and then rolled over on her back, her last words being: 'It's too late now, but look after the children'. She struggled just a few moments and I could see she was too far gone to do anything. I did not like to see her lay there and suffer, so I just put both hands round her neck until she stopped breathing, which was only a few

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seconds." In addition, the appellant went into the witness box and gave on oath practically the same account of the killing, and when asked in cross-examination: "When you put your hands round that woman's neck and gave pressure through your fingers, you intended to end your wife's life, did you not?", he answered: "Yes". Upon that evidence the learned Judge at the trial told the jury that, having regard to the law, it was not open to them to find a verdict of manslaughter, and that that which was put forward as provocation by the counsel for the accused man, namely, the statement by the woman to the man that she had been unfaithful to him, was not such provocation as would justify them in returning a verdict of manslaughter instead of murder.

We are clearly of opinion that the learned Judge was right in giving this direction to the jury upon this evidence. Generally speaking, the killing of a man or woman by a person who intends either to kill or do grievous bodily harm is murder, and the use of a lethal weapon such as a hammer-head or pick, or the employment of such a means as manual strangulation, is by itself sufficient evidence of such intention to kill or harm. On the other hand, the law has always recognised that provocation may induce a person to resentment and may thus negative the intention which is a necessary ingredient in the crime of murder, reducing the unlawful killing to killing without intention or malice and so to manslaughter. Thus, if a man be provoked by violence, such as a blow, and retaliate forthwith and death result from that retaliation, he will be guilty of manslaughter and not of murder, provided the retaliation be that which may be expected of an ordinary, reasonable man so provoked and in this connection the instrument used must be taken into account. A blow with the fist is a thing which may readily be expected in such circumstances, but a blow with an axe or a hammer is another matter. The test is whether that which provoked the retaliation was such as would deprive a reasonable man of his self-control and induce him to act hastily in

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the way in which the man accused in fact acted. It is not therefore surprising to find that one form of provocation which would reduce what would be murder to manslaughter is the sudden discovery by a husband of his wife in the act of adultery; it is indeed difficult to imagine circumstances more likely to deprive a reasonable man of his self-control (PEARSON (1835), 2 Lewin 216, *per* Baron Parke), but it is to be noted that what Baron Parke said in that case was this: "If a man kill his wife or the adulterer in the act of adultery, it is manslaughter, provided the husband has ocular inspection of the act, and only then". Nevertheless, in ROTHWELL (1871), 12 Cox 145 at p. 147, Blackburn, J., summing up to a jury in a case of a man charged with murdering his wife, went so far as to say: "As a general rule of law, no provocation of words will reduce the crime of murder to that of manslaughter, but under special circumstances there may be such a provocation of words as will have that effect; for instance, if a husband suddenly hearing from his wife that she had committed adultery, and he having had no idea of such a thing before, were thereupon to kill his wife, it might be manslaughter". In that case the tongs were ready to the accused man's hand, and with them he struck the woman the blow which killed her. That summing up of Blackburn, J., is not binding on this Court, but in PALMER, 8 Cr. App. R. 207; [1913] 2 K. B. 29, this Court, while not dissenting from it, refused to extend the exception to cover the case of a man engaged to be married to a young woman whom he killed when the young woman had confessed to illicit intercourse with someone else. Channell, J., delivering the judgment of the Court, said (at pp. 210 and 30 of the respective reports): "It would perhaps have been more accurate in view of modern decisions if he had said that words cannot constitute sufficient provocation except in very special circumstances. But the only special circumstances which have been held sufficient for that purpose are where the words involved a confession of adultery. It is well-established law that if a husband discovers his wife in the act of adultery and there-

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upon kills her he is guilty of manslaughter only and not of murder. That has been extended in ROTHWELL (*supra*), and JONES (1908), 72 J. P. 215, to a sudden confession by a wife of past adultery, an extension which no doubt creates an exception to the general rule that provocation by words is not enough. The reason for that exception is that a sudden confession is treated as equivalent to a discovery of the act itself". Later in the same year this Court refused to extend the rule to cover the case of a man and woman living together but not married (GREENING, 9 Cr. App. R. 105; [1913] 3 K. B. 846). In both cases stress was laid upon the suddenness of the alleged confession in the case of ROTHWELL (*supra*). In BIRCHALL (1913), 9 Cr. App. R. 91, in laying down that mere suspicion of a wife's adultery was not sufficient to reduce a husband's homicide of the suspected person to manslaughter, the Court said that the instance dealt with by Blackburn, J., in ROTHWELL (*supra*) was an extreme case, that there was no case which went any further and that in the opinion of the Court there should be no extension of the doctrine there laid down. With this expression of opinion we are completely in agreement.

Now, the appellant in the case before us was not informed of something of which he had no idea beforehand. He did not kill his wife by one blow alone, but on his own confession after getting the denture out of her throat, which otherwise might have choked her, he then proceeded to strangle her to death. To hold that a killing in these circumstances could fall within the exception of the general rule that no words are sufficient provocation would be to extend the exception in two directions; first, to a case where the husband himself unfaithful had, and for some time had had, an idea that his wife had been unfaithful, and secondly to a case where the killing was not the result as in ROTHWELL'S CASE (*supra*) of a mere blow, but to a course of conduct intermittent, then repeated and prosecuted with determination until the man's wife lay dead.

For these reasons we think that the appeal must be

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dismissed, and we think that it cannot be too widely known that a person who, after absence for some reason such as service, either suspects already or discovers on his return that his wife has been unfaithful during his absence, is not on that account, even if she confesses the adultery, a person who may use lethal weapons upon his wife and if that violence should result in her death claim to have suffered such provocation as would reduce the crime from murder to manslaughter.

Appeal dismissed.

The appellant appealed, by fiat of the Solicitor-General, to the House of Lords. The appeal was heard on May 6, 7, 8, 9 and 10, 1946.

P. E. Sandlands, K.C., for the appellant:

At the trial Charles, J., ruled that it was not open to the jury on the evidence to find a verdict of manslaughter, and the Court of Criminal Appeal held that this ruling was correct. It is submitted that the issue of manslaughter should have been left to the jury. The wife's confession of adultery was capable of temporarily depriving the appellant of self-control, and of constituting sufficient provocation in law, and it was for the jury to say whether there was a loss of self-control, and if so, for how long it lasted, and whether it covered all the subsequent acts of violence, including the squeezing of the neck. The earliest statement of the law relating to provocation to be found in any text-book appears in Blackstone's *Commentaries* (1769 ed.), Vol. IV, p. 190, and was considered in the following old authorities: LORD MORLEY'S CASE (1666), 6 St. Tr. 769; ROYLEY (1612), 3 Cro. Jac. 296; PEARSON (1835), 2 Lew. 216; and SHERWOOD (1844), 1 C. & K. 556. An extension of the law appears for the first time in ROTHWELL (1871), 12 Cox C. C. 145, where Blackburn, J., left the issue of manslaughter to the jury. There the provocation relied on consisted in a confession of adultery by a wife, and it is important to observe that it appears from the evidence that several blows were struck by the

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prisoner and that the prisoner's suspicion had been aroused long before he attacked his wife. Blackburn, J., put the test as being whether the provocation was such as would be calculated to affect an ordinary reasonable man, and that decision, therefore, may be regarded as a forerunner of the recent decision of the House in MANCINI *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 28 Cr. App. R. 65; [1942] A. C. 1, which, it is submitted, is the authoritative statement of the law on provocation. In JONES (1908), 72 J. P. 215, a sudden confession of adultery was held to constitute sufficient provocation. In BIRCHALL (1913), 9 Cr. App. R. 91, the Court of Criminal Appeal refused to extend the doctrine to the killing of the prisoner's brother by the prisoner on an unfounded suspicion of adultery with the prisoner's wife; in GREENING, 9 Cr. App. R. 105; [1913] 3 K. B. 846, to the case of unmarried persons living together; and in PALMER, 8 Cr. App. R. 207; [1913] 2 K. B. 29, to the killing of a fiancée. In the latter case Channell, J., in delivering the judgment of the Court, said that words could not constitute provocation, except in very special circumstances. That proposition is not dissented from for the purposes of the present argument, though the statement of the law in MANCINI *v.* DIRECTOR OF PUBLIC PROSECUTIONS (*supra*), that anything which would cause a reasonable man so to lose his self-control as to do the unlawful act may constitute sufficient provocation, appears more satisfactory. There are cases in which it is the duty of the Judge to tell the jury that even if they believe all the facts on which the prisoner relies as constituting provocation, those facts cannot amount to provocation in law, but in the present case there was on the authorities evidence of provocation to be considered by the jury. WOOLMINGTON *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 25 Cr. App. R. 72; [1935] A. C. 462, dealt only with the position where at the end of the evidence the jury were left in honest doubt whether there was provocation. It did not deal with the question of what constituted provocation. That was left for the decision of the House in MANCINI *v.* DIRECTOR OF PUBLIC PROSECUTIONS (*supra*).

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[VISCOUNT SIMON: Are there not really two questions for the jury to consider? Would a reasonable man so lose his self-control as to act in the manner in which the accused person acted? and, Had the accused person so lost his self-control when he acted?]

Yes. MANCINI'S CASE (*supra*) definitely laid down the test as being whether the provocation was such as would temporarily deprive a reasonable person of self-control, so that as a result of it the person provoked committed the unlawful act which caused death; and further it follows from that case, read in conjunction with WOOLMINGTON'S CASE (*supra*), that wherever there is evidence which might cause a jury to be left in doubt whether the act was provoked or not, that issue should be left to the jury.

[LORD SIMONDS: Is it your contention that, whenever either spouse has made a confession of adultery to the other spouse, even without any attendant circumstances of further aggravation, it must be left to the jury to say whether there was sufficient provocation?]

Yes, and it is further contended that no Court can lay down as a matter of law that certain things are not to be sufficient to provoke a future generation.

[VISCOUNT SIMON: If your interpretation of the decision in MANCINI'S CASE (*supra*) is correct, will not cases in which felonious homicide is reduced to manslaughter be increased?]

That may be the result, though it will not necessarily be so. It is, however, far safer to leave the matter generally to the jury with the guiding principle laid down in that case and to trust to the good sense of ordinary, reasonable men than to attempt to limit it by excluding certain matters as matters of law. [He referred also to ROBERTS (1942), 28 Cr. App. R. 102.]

Elizabeth K. Lane, following for the appellant:

It is necessary to draw a distinction between two kinds of provocation—that arising from a blow or insulting words, and that arising from the discovery of the fact of adultery on the part of a spouse. With regard to the second kind,

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the authorities establish that it is to be treated as capable of reducing murder to manslaughter, provided that there has been no cooling of the blood, even though the fatal blow has been struck with intent to kill. ROTHWELL (*supra*) was the first hint of any exception to the rule that words alone cannot constitute sufficient provocation. In JONES (*supra*), which was subsequent to that case, there was evidently an intent to kill. In PALMER (*supra*) the decision in ROTHWELL (*supra*) appears to have been explained on the basis that a sudden confession of adultery was equivalent to a discovery of the act of adultery. If killing immediately on discovery of adultery bears a reasonable relationship to the provocation afforded by the discovery, it was for the jury in the present case to say whether the killing did or might bear a reasonable relationship to the provocation arising from the discovery of the adultery as the result of the wife's confession.

Sir Frank Soskice, K.C. (Solicitor-General), (*E. Anthony Hawke* and *Rodger Winn* with him) for the Crown:

The questions raised by this appeal appear to be whether there is any general rule that words can never constitute sufficient provocation to reduce what would otherwise be murder to manslaughter; if there is any general rule in those or similar terms, whether there is any exception to it; and if there is any such exception, what are its precise limits. The general submission of the Crown is that words can never amount to sufficient provocation where the killing is done with the intent of killing. It would be in the highest degree unfortunate if there should be a general impression that, on confession of adultery by a spouse, there is something like a licence to kill. The submission of the Crown may be formulated in the following propositions of law: (i) Whatever the law of provocation is, confessions of adultery stand on the same footing as other types of provocative conduct; (ii) it is manslaughter if both the following conditions are fulfilled: (a) the accused person was subjected to provocation which would have provoked a reasonable man to do what he did with

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the intention which he had in doing it, or, if he had no intention or an incompletely formed intention, with that degree of disregard of the consequences of his action; (b) he did the act with that intention in consequence of the continuing influence of that provocation; (iii) with regard to the functions of Judge and jury: (a) it is for the jury to say, subject to what is said subsequently, whether the provocative conduct alleged was such as would provoke a reasonable man in the sense above indicated; (b) the jury must clearly decide whether, assuming that there was provocation which would have provoked a reasonable man, the accused person was in fact provoked in the sense above indicated; (c) it is for the jury to find the facts as to the act and intention and proceed to their findings as to provocation according to the view which they take of what was the act and intention. There are, however, certain legal propositions which are a matter of law and solely for the Judge, including the following:—(a) A reasonable man would be provoked by the sight of his wife committing adultery; (b) words alone can never be sufficient to provoke a reasonable man to form a fixed intention to kill (or possibly to cause grievous bodily harm), though possibly that should be qualified by adding the words "except in very special circumstances of aggravation"; (c) nothing but the most compelling provocation can ever provoke a reasonable man to the intention to kill.

[He referred to Hale's *Pleas of the Crown* (1778 ed.), Vol. I, pp. 455, 486; LORD MORLEY'S CASE (*supra*); MAWGRIDGE (1707), 17 St. Tr. 66; Kelyng's *Pleas of the Crown*, 55; Foster's *Crown Law* (1762 ed.) p. 290; SMITH (1866), 4 F. & F. 1066; MASON (1912), 8 Cr. App. R. 121; GAUTHIER (1943), 29 Cr. App. R. 113; KWA TOO MENSHA *v.* THE KING, [1946] A. C. 83, at p. 93.]

Until 1871 no one ever suggested that there should be anything of a special quality attaching to confessions of adultery, and it is submitted that the direction of Blackburn, J., in ROTHWELL (*supra*) was wrong. MANCINI *v.* DIRECTOR OF PUBLIC PROSECUTIONS (*supra*) did not purport to alter the law,

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and that decision is clear authority for the proposition that if at the end of a case the evidence does not disclose sufficient material on which a jury can find that there was sufficient provocation, it is the duty of the Judge not to leave the case to the jury. There was no sufficient material in the present case and Charles, J., was right in not leaving the issue of manslaughter to the jury. The correct view of the law, it is submitted, is that words alone, whether they contain an insult or contain an admission, can never constitute sufficient provocation, and the House is invited to overrule the law as Blackburn, J., purported to lay it down in ROTHWELL (*supra*) and as it has been laid down in subsequent cases such as PALMER (*supra*).

Elizabeth K. Lane, in reply:

If the law were to be established that a confession of adultery cannot be sufficient provocation to reduce what would otherwise be murder to manslaughter, that would not act as a deterrent to killing, since the whole basis of the defence of provocation is loss of self-control. The law as laid down in ROTHWELL (*supra*) and PALMER (*supra*) should be followed. The general definition of provocation given in MANCINI *v.* DIRECTOR OF PUBLIC PROSECUTIONS (*supra*) is wide enough to include such a view.

At the conclusion of the arguments VISCOUNT SIMON announced that the appeal would be dismissed, and that the House would give their reasons at a later date.

July 4.—The following opinions were read:

VISCOUNT SIMON.—This was the appeal of Leonard Holmes against the decision of the Court of Criminal Appeal (Lord Goddard, C.J., Wrottesley and Croom-Johnson, JJ.) on April 5, 1946, dismissing his appeal against conviction before Charles, J., at Nottinghamshire Assizes on February 28, 1946, of the murder of his wife, Mrs. Peggy Agnes Holmes.

On April 12 the appellant obtained from the Solicitor-

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General (who was acting in place of the Attorney-General under the Law Officers Act, 1944) a certificate that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance, and that it was desirable that a further appeal should be brought to the House of Lords. The point of law was whether Charles, J., was right in telling the jury that, on the evidence at the trial, and having regard to the law, it was not open to the jury to find a verdict of manslaughter, and that the statement by the appellant's wife to him that she had been unfaithful to him was not such provocation as could justify a verdict of manslaughter instead of murder. More generally, the question to be considered was what were the respective functions of Judge and jury in such cases, and how the law drew the line between instances of provocation which would, and those which could not, make it proper for the jury to be left to decide on the facts on the appropriate verdict.

[The noble and learned Viscount then stated the facts set out above, and continued:]

There was no corroboration at the trial to support the accused's statement that his wife admitted her unfaithfulness; but for the purpose of deciding whether Charles, J.'s, direction to the jury was correct, it must be assumed that she did, and that either her confession or her pertinent inquiry about his own misconduct provoked him to lose his temper. The House was unanimous in holding that the direction given by the Judge was correct; there were no circumstances of special aggravation, and confession of adultery, grievous as it is, cannot in itself justify the view that a reasonable man (or woman) would be so provoked as to do what this man did. The House accordingly dismissed the appeal, while taking further time to pronounce on the more general questions of law and principle discussed in the course of the argument.

In dealing with provocation as justifying the view that the crime may be manslaughter and not murder, a distinction must be made between what the Judge lays down as matter of law, and what the jury decides as matter of fact. If there

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is no sufficient material, even on a view of the evidence most favourable to the accused, for a jury (which means a reasonable jury) to form the view that a reasonable person so provoked could be driven, through transport of passion and loss of self-control, to the degree and method and continuance of violence which produces the death, it is the duty of the Judge as matter of law to direct the jury that the evidence does not support a verdict of manslaughter. If, on the other hand, the case is one in which the view might fairly be taken (a) that a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to use the violence with fatal results, and (b) that the accused was in fact acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict. It is hardly necessary to lay emphasis on the importance of considering, where the homicide does not follow immediately on the provocation, whether the accused, if acting as a reasonable man, had "time to cool".

The distinction, therefore, is between asking "Could the evidence support the view that the provocation was sufficient to lead a reasonable person to do what the accused did?" (which is for the Judge to rule), and, assuming that the Judge's ruling is in the affirmative, asking the jury: "Do you consider that, on the facts as you find them from the evidence, the provocation was in fact enough to lead a reasonable person to do what the accused did?" and, if so: "Did the accused act under the stress of such provocation?"

WOOLMINGTON *v.* DIRECTOR OF PUBLIC PROSECUTIONS (25 Cr. App. R. 72; [1935] A. C. 462) shows that if the jury, after a proper summing up, entertains a reasonable doubt as to the answer to these questions, it ought to give the accused the benefit of the doubt. MANCINI *v.* DIRECTOR OF PUBLIC PROSECUTIONS (28 Cr. App R. 65; [1942] A. C. 1) points out the importance of considering the nature of the weapon used in retort—in that instance Macnaghten, J., was held to be justified in excluding the possibility of mere manslaughter

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when a dagger was employed in resentment to a blow aimed at the accused with a fist, for " the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter " (at pp. 74 and 9 of the respective reports).

The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm, is negatived. Consequently, where the provocation inspires an actual intention to kill (such as Holmes admitted in the present case), or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies. Only one very special exception has been recognised —namely, the actual finding of a spouse in the act of adultery. This has always been treated as an exception to the general rule: MANNING ((1672), T. Raym. 212). Blackstone (Bk. iv, p. 192) justifies the exception on the ground that " there could not be a greater provocation " But it has been rightly laid down that the exception cannot be extended, for example, by Baron Parke in PEARSON ((1835), 2 Lew. C. C. 216), where he insisted on the condition of ocular observation. Even if Iago's insinuations against Desdemona's virtue had been true, Othello's crime was murder and nothing else.

Necessary self-defence, or action taken in the necessary defence, for example, of wife or child from outrage or maltreatment, stand apart, as in such cases there is no crime at all committed.

This brings me to the question which, as I understand, was the actual reason why the Law Officer's certificate was given in this case—namely, whether " mere words " can ever be regarded as so provocative to a reasonable man as to reduce to manslaughter felonious homicide committed on the speaker in consequence of such verbal provocation. There is nothing in the decision of this House in MANCINI *v.* DIRECTOR OF PUBLIC PROSECUTIONS (*supra*) which was intended to prejudge this question, nor does the decision in fact do so.

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It is first to be observed that provocation by "mere words" may have more than one meaning. It may mean provocation by insulting or abusive language, calculated to rouse the hearer's resentment. The contrast with provocation by physical attack is obvious. A blow may in some circumstances rouse a man of ordinary reason and control to a sudden retort in kind, but the proverb reminds us that hard words break no bones, and the law expects a reasonable man to endure abuse without resorting to fatal violence. It is in this sense that the constantly repeated statement in the old books that "mere words" (not being menace of immediate bodily harm) do not reduce murder to manslaughter is to be understood; see Hale's *Pleas of the Crown* (ed. Emlyn, Vol. I, p. 456), citing the resolution of all the Judges in 1666 on the occasion of the trial of LORD MORLEY for murder ((1666), 6 St. Tr. 770, at p. 771); MAWGRIDGE ((1706), 17 St. Tr. 57, at p. 66); Hawkins' *Pleas of the Crown* (Bk. i, ch. 13, s. 33); East's *Pleas of the Crown* (Vol. I, p. 233).

There is, however, a different sense which may sometimes attach to the meaning of "mere words", for they may be used, not as an expression of abuse, but as a means of conveying information of a fact, or of what is alleged to be a fact. This must be the sense in which Blackburn, J., spoke in ROTHWELL ((1871), 12 Cox C. C., 145, when, in the course of summing up to a jury in the case of a man charged with murdering his wife, he went so far as to say (at p. 147): "As a general rule of law, no provocation of words will reduce the crime of murder to that of manslaughter, but under special circumstances there may be such a provocation of words as will have that effect; for instance, if a husband suddenly hearing from his wife that she had committed adultery, and he having no idea of such a thing before, were thereupon to kill his wife, it might be manslaughter." It is to be noted that Blackburn, J., said "might", and not "would", and the illustration had no resemblance to the facts of the case which he was trying.

Blackburn, J.'s *dictum* was applied in the accused's favour

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in JONES ((1908), 72 J. P. 215), and was not dissented from in PALMER (8 Cr. App. R. 207; [1913] 2 K. B. 29), when, however, the Court of Criminal Appeal refused to extend the suggested exception to cover the case of a man engaged to be married to a young woman whom he killed when she confessed to illicit intercourse with someone else. Channell, J., in delivering the judgment of the Court, said that the reason for the exception suggested by Blackburn, J., was that a sudden confession was treated as equivalent to a discovery of the act itself.

In my view, however, a sudden confession of adultery without more can never constitute provocation of a sort which might reduce murder to manslaughter. The *dictum* attributed to Blackburn, J., and any cases which seem to accept or apply it, can no longer be regarded as good law. The rule, whatever it is, must apply to either spouse alike, for we have left behind us the age when the wife's subjection to her husband was regarded by the law as the basis of the marital relation, when, as Bracton said (see Pollock and Maitland's *History of English Law*, Vol. II, p. 408), she was "*sub virga viri sui*", and when the remedies of the Divorce Court did not exist. Parliament has now conferred on the aggrieved wife the same right to divorce her husband for unfaithfulness alone as he holds against her, and neither, on hearing an admission of adultery from the other, can use physical violence against the other which results in death and then urge that the provocation received reduces the crime to mere manslaughter.

It is not necessary in this appeal to decide whether there are any conceivable circumstances accompanying the use of words, without actual violence, which would justify the leaving to a jury of the issue of manslaughter as against murder. It is enough to say that the duty of the Judge at the trial, in relevant cases, is to tell the jury that a confession of adultery without more is never sufficient to reduce an offence which would otherwise be murder to manslaughter and that in no case could words alone, save in circumstances of a most

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extreme and exceptional character, so reduce the crime. When words alone are relied on in extenuation, the duty rests on the Judge to consider whether they are of this violently provocative character, and, if he is satisfied that they cannot reasonably be so regarded, to direct the jury accordingly.

There are two observations which I desire to make in conclusion. The first is that the application of common law principles in matters such as this must to some extent be controlled by the evolution of society. For example, the instance given by Blackstone (Bk. iv, p. 191, citing an illustration in Kel. p. 135), that if a man's nose was pulled, and he thereupon struck his aggressor so as to kill him, this was only manslaughter, may well represent the natural feelings of a past time, but I should doubt very much whether such a view should necessarily be taken nowadays. The injury done to a man's sense of honour by minor physical assaults may well be differently estimated in differing ages. And, in the same way, one can imagine, in these days, at any rate, words of a vile character which might be calculated to deprive a reasonable man of his customary self-control even more than would an act of physical violence. But, on the other hand, as society advances, it ought to call for a higher measure of self-control in all cases.

The remaining reflection is as follows: the reason why the problem of drawing the line between murder and manslaughter, where there has been provocation, is so difficult and so important is because the sentence for murder is fixed and automatic. In the case of lesser crimes provocation does not alter the nature of the offence at all, but it is allowed for in the sentence. In the case of felonious homicide the law has to reconcile respect for the sanctity of human life with recognition of the effect of provocation on human frailty.

My Lords, my noble and learned friend LORD MACMILLAN authorises me to say that he concurs in the opinion which I have just expressed.

LORD PORTER: My Lords, I concur.

LORD SIMONDS: My Lords, I also concur.

LORD DU PARCQ: My Lords, I concur.

Appeal dismissed.

Solicitors: Ludlow & Co., for the appellant.

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BEFORE

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Sentence—Abandonment of Appeal.

Where an appellant has been given leave to appeal against sentence with a view to the question of an increase being considered by the Court, he has the right to abandon his appeal at any time until the hearing of the appeal actually begins.

Appeal against conviction and sentence.

The appellant was convicted at Newcastle-on-Tyne Assizes on February 6, 1946, of rape and of aiding and abetting another person to commit rape and was sentenced by Cassels, J., to three years' penal servitude.

C. D. Aarvold, for the appellant:

The appellant desires to abandon his appeal against sentence, for which leave was granted by the Court.

E. Anthony Hawke, for the Crown.

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THE LORD CHIEF JUSTICE (after stating that there was no ground for interfering with the conviction): With regard to sentence, the real object of giving leave to appeal in this case was to consider whether or not the sentence should not be materially increased, because once there is an appeal to this Court against sentence the statute requires that this Court shall pass such sentence as it thinks should have been passed, whether greater or less. Recently, we have not hesitated in proper cases where we thought the sentence was too low to meet the offence to increase the sentence. With all respect to the learned Judge, with whom I have had a communication, I do not hesitate to say, for myself, that I regard this sentence as inadequate for the offence which has been committed. Whether it would have been adequate if all that had happened was that the appellant himself had raped the girl is another matter. To my mind, it is clearly inadequate in a case where he not only raped her but assisted his friend to rape her and stood by while his friend raped her. Mr. Aarvold, as might be expected, gave excellent advice to his client and that was to abandon his appeal against sentence. We have to consider, and that is the only point of real importance in this case, whether or not, leave to appeal having been given, it was open to the appellant, without leave of the Court, to abandon his appeal. That really depends upon a consideration of two of the statutory rules made under the Criminal Appeal Act. In some cases a man can appeal as of right on a pure question of law. Where he wishes to appeal against sentence he can only appeal by leave, and on facts he can only appeal by leave. In this case he applied for and obtained leave to appeal. It is provided by rule 22 that once leave to appeal has been given it is not necessary for a further notice of appeal to be served, but a notice of application for leave to appeal is to stand as the notice of appeal. Then rule 23, the sidenote to which is "Abandonment of appeal", provides that "an appellant at any time after he has duly served notice of appeal or of application for leave to appeal, or of application for extension of time

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within which under the Act such notice shall be given, may abandon his appeal by giving notice of abandonment thereof in the form in the schedule to these rules to the Registrar". Then there is a special form provided for giving such notice, but if it be the fact that the appellant has a right to abandon his appeal at any time, the Court would not prevent him exercising that right merely because, not having had the advantage of seeing counsel until the last moment, he has not had time to put that notice into writing. That would be taking too severe and too technical a view in a case of this sort. It seems to me clear under the statutory rule that the appellant can at any time abandon his appeal. In those circumstances, as Mr. Aarvold told us the moment when the case was called on that he had abandoned his appeal against sentence, we think that he had a right to do so, and, therefore, the sentence cannot be increased by this Court. If it had not been for that, and if he persisted in his appeal, the sentence certainly would have been increased by this Court. I cannot but hope that notice will be taken of the fact that cases in which men help each other to commit the dastardly crime of rape upon young women are cases which deserve the most severe and condign punishment. The appeal is dismissed.

Appeal dismissed.

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HORACE HENRY BRYANT.
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Evidence—Material Witness—Statement Taken by Prosecution—Duty towards Defence—Refreshing Memory—Observations.

Where the prosecution have taken a statement from a person who can give material evidence but decide not to call him as a witness, they are under a duty to make that person available as a witness for the defence, but they are not under the further duty of supplying the defence with a copy of the statement which they have taken.

A witness who has kept a record as part of his duty is entitled to look at that record and give evidence that he is satisfied that he kept the record accurately and that, as a particular event is there recorded as having happened on a particular day, that event did so happen as recorded.

Appeals against conviction.

The appellants were convicted at the Central Criminal Court on January 17, 1946, of conspiracy to defraud and of obtaining money by false pretences and were sentenced by the Common Serjeant, Dickson to twenty months' imprisonment and Bryant to ten months' imprisonment.

The appellant Dickson held virtually all the shares in a company called Hortensia Garages, Ltd., which owned a number of garages carrying on a repair business, and the appellant Bryant was his servant. The London County Council entered into an agreement with the company, under which they sent from August, 1941, to August, 1943, ambulances requiring repair to one of the company's garages, the work being done on a cost plus profit basis. A note stating the nature of the required repair was sent with the vehicle and the vehicles were booked out and in by a clerk in the employ of the Council. It was the duty of an employee of

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the company at the garage to make an estimate of the work which had to be done, and where that differed from the work specified in the note the sanction of a supervising mechanic named Campbell was required. The case was presented on the footing that Campbell, either consciously or unconsciously, facilitated the frauds which were perpetrated. The prosecution had taken a statement from Campbell, but they did not call him as a witness at the preliminary investigation. At the end of those proceedings the Director of Public Prosecutions informed the representatives of the defence that there was no objection to the defence taking a statement from Campbell if they desired to do so, but they did not at any time supply the defence with a copy of Campbell's statement. Campbell was not called by either side at the trial, and the Common Serjeant criticised this omission in his summing-up.

J. Scott Henderson, K.C., and *H. G. Garland* for the appellants:

The witness who gave evidence with regard to the movements of the vehicles from the London County Council's garage was not using the record which she produced to refresh her memory in the accepted sense of that phrase. She was not purporting to use the book to assist her in giving details of events which she actually remembered, and her evidence was inadmissible because, by producing the record, the prosecution in effect were endeavouring to make that record evidence without relying on the recollection of the witness at all. Secondly, the prosecution, having taken a statement from Campbell and having decided not to call him as a witness, were under a duty to furnish the defence with a copy of the statement, in order to enable the defence to decide whether they should call him. There was in the past some doubt on the duty of the prosecution in such circumstances, but it is submitted that the ruling given by Hawke, J., in NICHOLSON (1937), unreported, set out in Archbold's *Criminal Pleading and Practice* (31st ed.) (1943), p. 470, is correct.

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Further, the Common Serjeant was wrong in telling the jury in his summing-up that, when the prosecution did not call Campbell, the defence ought to have called him; the matter was one entirely within the discretion of the defence.

E. Anthony Hawke, for the Crown, was not called on to argue.

THE LORD CHIEF JUSTICE: The two appellants were charged with very extensive frauds on the London County Council. The appellant Dickson was to all intents and purposes the owner, that is to say, he held all the shares, with the exception of one, of a company called Hortensia Garages, Ltd. That company is the owner of certain garages which carry on a repair business, and the appellant Bryant was Dickson's foreman. It appears that the London County Council, having a large number of ambulances which had to be maintained during the war for Civil Defence purposes, had different posts, one being the Wandsworth Post. They entered into an agreement with Hortensia Garages, Ltd., under which from some date in August, 1941, to August, 1943, they sent vehicles that wanted either running repairs or more serious repairs to the company's garages to be repaired on a cost plus profit basis. The system adopted was that, when a vehicle required repair, a note was made out at the ambulance station stating what the repair was to be. The note was sent down to the garage with the vehicle, and the vehicle would be booked out and in by a clerk whose duty it was to keep a record of them. When the vehicle was sent down, it was the duty of the person at the garage to make an estimate of the work that was to be done. If that differed from the work shown on the form or chit which was sent down to the garage, it had to be sanctioned by a man of the name of Campbell, who was called a supervising mechanic. The case was obviously presented on the basis that Campbell did, either consciously or unconsciously, facilitate the alleged frauds. What was suggested was that in a very large number of cases, which were investigated with great patience by the jury in

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a case which took some five days to try, and which was summed-up with meticulous care by the learned Common Serjeant, a vehicle would be sent down for some small running repair, and the form made out and sent down to the garage. When the estimate came back, somebody, who would not necessarily be the same person as the person who made out the chit for the work to be done, found that the estimate consisted of a great number of repairs. The invoice which followed on the estimate showed that instead of a few shillings, perhaps, or in some cases it may be a pound or two, there were extensive repairs involving a great many pounds. It was suggested that that was all a fraud, that the work was never done, and that the appellants were charging the London County Council, and through them the ratepayers of London, for thousands of pounds' worth more work than they actually did. That was the case which the prosecution set out to prove, and they gave evidence of a large number of cases. To take one instance, a vehicle was sent out because the battery had run down. Therefore, in that one case at any rate, there was a demand on the garage not to do any work on the vehicle at all but simply to send up a new battery. When the case was investigated by the district auditor, it was found that the vehicle need not have been sent to the garage at all but the battery could have been fixed by the driver, yet hours and hours of work were shown as having been done on that vehicle at a time when it had never been out of service, and the estimate had been altered to show that £16 or £20 worth of work had been done.

The first point taken by Mr. Scott Henderson is as follows: The vehicles mentioned in the estimates and invoices which were supposed to have been down at the garage for hours and hours of work were, according to the case for the prosecution, away from the depot for a few minutes or it might be half an hour, or indeed, in the case I have mentioned, had never been sent down at all. This matter came to be investigated in 1945 and 1946, and these transactions had been taking place from 1941 to 1943. If any witness had come forward and

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said: "I remember that this particular vehicle went out on a particular day in a particular month, and was only absent for ten minutes, or something of that sort", no one would have believed it, because human memory would not enable a person to say such a thing. The prosecution, therefore, produced as a witness the lady who kept the book which showed the booking out and in of these vehicles, and she, looking at her book, said: "On such-and-such a day I booked out that vehicle at such-and-such a time, and on the same day I booked it in ten minutes or half an hour afterwards". It was said that that evidence was inadmissible because the prosecution were putting in the book and not relying on the evidence of the witness. It is precisely because circumstances of that sort constantly occur in human affairs that the law allows a person who has kept a record to look at it for the purpose of refreshing his memory. "Refreshing his memory" is an inaccurate expression in some respects, but on most occasions it enables the witness to speak to something which his memory cannot carry from a record made at the time. Ever since the law of evidence has been what it is, it has been perfectly legitimate for a witness to say: "I have my own record; it was my duty to keep it; I did keep it accurately according to the best of my powers, and I can say from looking at my record that an event happened on a certain day, and on another occasion, either on that day or some other day, another event happened". It was not necessary for the witness in the present case to say: "Now I see this, I remember that vehicle going out". If she could do so because of some particular circumstance, that would be refreshing her memory in the strict sense of the word, but it was not necessary to go as far as that to make her evidence admissible. A person who keeps a record as part of his duty is entitled to look at that record and looking at the record give evidence: "I am satisfied I kept this record, and this, that or the other happened, and it is duly recorded". Further, it has been clearly the law for more than a century that if the person who kept the record is dead, a record kept

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by that person in the ordinary course of business may be put in as evidence. It is *prima facie* evidence only, and the other side may always show, if they can, that it is inaccurate; and of course it is always open to a jury to say: "We are not satisfied with that evidence and we will not act upon it", but if they are satisfied and do act upon it, no objection can be taken that it is not admissible. It is admissible, and has been for a very great number of years. That point, therefore, fails.

Another point taken is that Campbell was not called at the trial. It is said that it was the duty of the prosecution to have supplied the defence with a statement which Campbell had admittedly made to the prosecution. The prosecution, for reasons which one can well understand, did not call Campbell. Is there a duty in such circumstances on the prosecution to supply a copy of the statement which they have taken to the defence? In the opinion of the Court there is no such duty, nor has there ever been. In the first place, if they had supplied a copy of the statement of Campbell, that would not have enabled the defence to put the statement in. The statement which Campbell made could have become evidence only if he had been called as a witness. But it is said that it was the duty of the prosecution to put that statement at the disposal of the defence. In the opinion of the Court, the duty of the prosecution in such a case is to make available to the defence a witness whom the prosecution know can, if he is called, give material evidence. That they did in this case, because when a letter was sent by the defence to the Director of Public Prosecutions, the reply of the Director of Public Prosecutions showed quite clearly that the prosecution did not intend to call him, but he added: "There is no objection to your taking a statement from Campbell if you wish to do so". That was said well before the trial. It was said after the close of the police court proceedings, when the defence knew that Campbell was not being called by the prosecution, and therefore could quite well themselves have gone to

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Campbell and taken a statement from him. Campbell was at the Court. Who brought him to the Court I do not know, nor is it material to inquire, but the defence could have called him if they had liked. No doubt Mr. Scott Henderson would not have been so unwise as to call him without having a statement from him, but if the defence did not choose to take a statement and find out what he was prepared to say, that is not a matter with which the prosecution are concerned. In the opinion of the Court it is quite wrong to say that it was the duty of the prosecution in these circumstances, having made Campbell available to the defence as a witness if they wished to call him, to go further and produce the statement which he had made.

The one remaining point is, in the opinion of the Court, the only point which caused them any anxiety. Campbell was not called by the prosecution, no doubt for very good reasons. He was not called for the defence, no doubt for equally good reasons, but the learned Common Serjeant in the very early stages of his summing-up said this: "There is one point in this case which you may not consider altogether satisfactory. Mr. Campbell is not called by either side. He is in the employment of the London County Council, and he signed, practically in every case, the certificate at the bottom of the defect note sent by the Hortensia Garages with the invoice that the work had been done. He is not called by either side. It is, perhaps, not for me to express any view as to whether the prosecution should have called him or the defence should have called him; that he should have been called, I have no doubt, by somebody". A little later he repeated, not quite so emphatically, much the same view, when he said: ". . . the one person who could have helped you is not called; and I say again the only inference you can possibly draw is that both sides are afraid to call him". The learned Common Serjeant did, in the opinion of the Court, put the matter rather too widely. It would have been better and more accurate if he had said some such words as these: "Campbell is absent, and it is not very satisfactory that he

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is not here. The prosecution could have called him, and have not done so, perhaps for very good reasons. The defence might have called him or not, as they liked." It is inaccurate to say the defence should have called him, because that is putting it too high, and to say "he should have been called, I have no doubt, by somebody" is also putting it too high. It would have been better to say: "The prosecution very likely for good reasons did not call him and that left the defence to call him or not as they chose." In a criminal case there is no obligation on the defence to call any witness, though the failure to call a particular witness may be a matter the jury will take into account. But it would be quite wrong to say that any miscarriage of justice has occurred by reason of the fact that the learned Common Serjeant used the word "should" instead of saying "might" have called him. It was a very long summing up, which displayed meticulous care. The documents were gone through carefully, and the case thoroughly explained. The jury took the view that the prisoners were guilty, and that was an inference which they were fully entitled to draw. There is no appeal against sentence and therefore the appeals are dismissed.

Appeals dismissed.

Solicitors: A. C. Warwick & Co., for appellants.

BEFORE

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ARTHUR JOHN TURVEY.

Larceny—Taking Invito Domino—*Trap laid by Owner—Instructions to Servant to Hand Property to Thief—Larceny Act*, 1916 (6 & 7 *Geo.* 5, *c.* 50), *s.* 1.

A servant, who was tempted by the appellant to take part in the larceny of his master's property, informed the master, who instructed him to follow out the suggestion made by the appellant and hand the property over to the appellant, which the servant did.

Held, that though an instruction by the master to the servant merely to facilitate the commission of the crime by the appellant would not have prevented the property from being taken *invito domino*, the position was different where, pursuant to the master's instructions, the property was actually handed to the intending thief by the servant, and that in those circumstances the property was not taken *invito domino*, and that the appellant had, accordingly, been wrongly convicted of larceny.

EGGINTON (1801), 2 Leach 913, distinguished.

Appeal against conviction.

The appellant was convicted at Devon Sessions on March 1, 1946, of larceny and was sentenced by the Chairman to eighteen months' imprisonment. On other counts, to which he pleaded guilty, he was sentenced to six months' imprisonment.

The appellant was in charge of a depot of the Minister of Works at Torquay, and was tempted by a foreigner at Newton Abbot to steal certain property of the Minister and dispose of it to that person. The appellant approached a Mr. Ward, who was in charge of a depot at Exeter, and endeavoured to persuade him to assist in the theft. Mr. Ward reported to his superior officer at Bristol, who was in control of the property,

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and this officer instructed Mr. Ward to pretend to fall in with the appellant's suggestion and hand the property over to him, and the police were informed. Mr. Ward did so and handed the appellant the property and obtained from him a fictitious receipt. At the trial a submission was made to the Chairman on behalf of the prisoner that he could not be found guilty of larceny, because the property had not been taken *invito domino*, but the Chairman overruled the submission.

J. Scott Henderson, K.C., and *Malcolm Wright*, for the appellant:

The Chairman was wrong in leaving the case to the jury, because there was here no evidence of larceny, inasmuch as the property was not taken *invito domino*. The Chairman relied on EGGINTON (1801), 2 Leach 913, as supporting his ruling, but the facts in that case were different. There the servant was merely instructed to facilitate the theft; in the present case Mr. Ward, on the instructions of his master, actually handed the property to the appellant.

H. E. Park, for the Crown:

The case is analogous to GARDINER (1845), 1 C. & K. 628, where delivery of property was made to a person to test his honesty, and it was held that such delivery did not prevent that person from being guilty of larceny when he subsequently misappropriated the property.

THE LORD CHIEF JUSTICE: The Court is of the opinion that the conviction must be quashed. The appellant appeals only against his conviction on count one of the indictment, on which he was sentenced to eighteen months' imprisonment. On the other counts, to which he pleaded guilty, he was sentenced to six months' imprisonment.

The circumstances were these: He was charged that on December 12, 1945, being a servant of His Majesty's Minister of Works, he stole from the Minister a considerable number of table knives, spoons and so forth. The appellant, evidently a thoroughly dishonest person to be in the employ

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of the Minister of Works, had got into touch with some foreigner living at Newton Abbot, and found that that person would be a ready receiver of goods which could be stolen from the depot of the Minister at Torquay, of which the appellant was then in charge. A Mr. Ward, who was in charge of a depot at Exeter, and was a perfectly honest and reliable servant, was tempted by the appellant and also by the would-be receiver at Newton Abbot, who apparently had control of certain bottles of spirits which were handed as inducements to Mr. Ward, to steal the property of the Minister and hand it to the appellant, who would in turn hand it to the man at Newton Abbot. Mr. Ward did the honest thing and at once communicated with his superiors at Bristol, the persons who were really in control of the property, and told them of this plan which had been suggested to him. The officials of the Ministry decided that it would be a good thing to let this plan go on and catch the culprits at a suitable time, which would enable them to prosecute the appellant for stealing. They told Mr. Ward to hand over the property to the appellant, and Mr. Ward did so.

On those facts, the question arose whether or not the appellant could be convicted of stealing. He might have been convicted of conspiracy, of inciting to commit a felony and of other charges, but could he be convicted of the felony of stealing? It is perfectly clear that if he stole the goods, he stole them at Exeter, but he did not take them there against the will of the owner because the owner handed them to him and meant to hand them to him. Mr. Malcolm Wright submitted no case, but the learned Chairman overruled the submission, and it appears that he decided principally on the authority of EGGINTON (1801), 2 Leach 918 an old case, but perfectly good law, and also because he took a certain view with regard to the control which the owner was exercising over the goods.

Let us see what were the facts in EGGINTON (*supra*). It was a case in which a servant told his master that some persons

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were going to rob the premises. "Very well", said the master, "let them rob the premises and we will catch them." In other words, to give a homely illustration, a man, knowing that somebody is going to break into his house, leaves the bolts drawn and so makes it easy for the man to come into the house, and when he comes in he catches him. A crime has in those circumstances been committed, and committed none the less because the servant has been told to make things easy. In this case, if Ward had been told by Mr. Brown, the person who really had control of these matters, "Let Turvey come in and take the goods", that would have been one thing, but he was told to take the goods and hand them to Turvey, and that makes all the difference.

One matter to which the learned Chairman seems to have attached considerable importance was, that Ward said to Turvey at the time when he was handing over the goods: "You must give me a receipt for these goods", and Turvey said he quite understood that and would give a receipt for them. Thereupon, a perfectly fictitious document was made out, which both parties knew and intended to be fictitious, under which it was made to look as though the goods were handed over to Turvey to take to the Palace Hotel at Torquay, but of course that was not an authority by Ward to Turvey to take the goods to Torquay because everybody knew that Turvey was meaning to steal these goods and they were to go to the receiver at Newton Abbot. No one intended that they were to go to Torquay, and this document was simply manufactured as a "blind", or whatever word should be used. It was not a genuine document, and therefore it was as if it did not exist. The other point on which the learned Chairman in his direction to the jury, as we think, went wrong was that he told them that the goods always remained under the control of the Minister, because apparently the police had been warned either to follow the appellant once he had stolen them, or to go immediately to Newton Abbot and find them in the possession of the receiver. That will not do. Once the goods were handed over to Turvey, they were under

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Turvey's control and nobody else's. What was to happen supposing, while he was driving along being followed by the police, the police car broke down? Of course, he would cheerfully drive away with the goods, which were under his control as soon as he went away with them.

The charge that was laid against the appellant was the wrong charge and a charge of which he could not properly have been convicted because there was no evidence here of what is termed asportation, to use a technical expression. He did not carry away the goods against the will of the owner because the owner was willing that he should have the goods and gave them to him. In those circumstances, the conviction of larceny will be quashed, but the appellant will not be discharged because he is already undergoing sentence of six months' imprisonment on other charges.

Conviction quashed.

Solicitors: J. C. M. Dyke & Toyne, Exeter, for appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE OLIVER, MR. JUSTICE CROOM-JOHNSON, MR. JUSTICE DENNING AND MR. JUSTICE LYNSKEY.

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Joinder of Counts—Separate Trials—Evidence Admissible on One Count and Inadmissible on Another—Evidence Tending to Show Bad Disposition—Specific Feature Connecting Evidence with Crime Charged—Unnatural Offences—Repetition of Acts.

The mere fact that evidence is admissible on one count in an indictment and inadmissible on another is not in itself a ground for ordering the counts to be tried separately; but

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where it would be difficult in the course of a summing-up to distinguish the evidence relating to the respective counts, and there is, therefore, a risk that the jury when considering one count may be unable to disregard the evidence relating to another count, there is a ground for ordering separate trials.

Evidence which tends to show that the prisoner is of bad disposition is (apart from the Criminal Evidence Act, 1898) admissible only if there is some specific feature distinct from mere tendency to prove bad disposition which connects the evidence with the crime charged. Such evidence, when admissible, is admissible irrespective of the line of defence adopted by the prisoner.

MAKIN *v.* ATT.-GEN. FOR NEW SOUTH WALES, [1894] A. C. 57, and THOMPSON *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 13 Cr. App. R. 61; [1918] A. C. 221, considered.

The prisoner was charged with buggery with A, B, C and D. There was a nexus between the charges relating to the four different persons in that it was alleged that they had all been invited by the prisoner to a particular house, and the circumstances of the various alleged offences bore a striking similarity.

Held, that on the trial of any of the charges the evidence relating to any other of the charges was admissible and that it was proper to try all the charges together.

Held, further, that, in view of the peculiar psychological nature of the crime of buggery, the mere repetition of the acts by the prisoner would in itself have been a specific feature connecting the prisoner with the crime charged, and that the evidence relating to any one charge would be admissible on any of the other charges even without the nexus referred to.

AILES (1918), 13 Cr. App. R. 173, approved and followed.

BAILEY, 18 Cr. App. R. 42; [1924] 2 K. B. 300, discussed.

Where an indictment contains counts charging indecent offences against both a male and a female, it ordinarily would not be proper to try the counts together, but where the persons against whom the offences are alleged to have been committed are children, it may be proper to try the counts together.

SOUTHERN (1930), 22 Cr. App. R. 6, not followed.

Appeal against conviction.

The appellant was convicted at Dorset Assizes on January 25, 1946, on three counts of an indictment charging buggery with three different men and was sentenced by Wrottesley, J., to five years' penal servitude.

The indictment contained ten counts. There were alter-

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native counts charging acts of gross indecency with the same three men, a count charging an act of gross indecency with a fourth man, and three counts charging indecent assaults on three separate boys. At the trial defending counsel applied for separate trials in respect of each person involved, but Wrottesley, J., refused the application and directed that the counts charging offences with the four men should be tried together.

J. D. Casswell, K.C., and *Raymond Stock*, for the appellant:

It is a fundamental rule that evidence should not be admitted to show the propensity of the prisoner to commit the kind of offence with which he is charged. Phillips' *Law of Evidence*, 9th ed., p. 477; COLE (1810), Russell on *Crimes* 9th ed., 653. In the present case the offences were alleged to have been committed with four different men on four different occasions, and beyond the fact that the appellant was accused in each case there was no connection between the offences charged. The only effect of trying them together would be to cause the jury to say that the appellant was a man of unnatural propensities because four different persons had given similar evidence against him. In CASTRO (1883), 6 App. Cas. 229, at p. 243, Lord Blackburn said that it was well established that where there were several charges of felony the joining of them in one indictment was so unfair to the prisoner that the Judge ought, on application being made to him, to put the prosecution to their election. It is particularly essential that there should be separate trials where all the witnesses for the prosecution are uncorroborated, as they were in the present case. In BAILEY, 18 Cr. App. R. 42; [1924] 2 K. B. 300, it was laid down that where an indictment contained a number of counts charging separate indecent assaults on separate persons, the jury should be warned to draw a careful distinction between the evidence on each count, and that they must not supplement the evidence on any count by looking at the evidence as a whole, and it was intimated that

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an application for separate trials might have succeeded. No such warning was given in the present case. The decision in AILES (1918), 13 Cr. App. R. 173, that a number of charges of indecency on young children might be tried together, and that it was proper to call one child on a count relating to another child to show that the prisoner had distorted sexual passions, is clearly at variance with the general trend of decisions and must be regarded as wrong. In THOMPSON, 13 Cr. App. R. 61, at p. 78; [1918] A. C. 221, at p. 232, Lord Sumner said: "No one doubts that it does not tend to prove a man guilty of a particular crime or to show that he is the kind of man who would commit a crime, or that he is generally disposed to crime or even to a particular crime." There the possession of powder puffs and indecent photographs by the prisoner was admitted because there was an issue of identity. It is true that similar evidence was admitted in TWISS, 13 Cr. App. R. 177; [1918] 2 K. B. 853, where there was no such issue, but even if that decision be correct, it is wrong to endeavour to give evidence of a special propensity by endeavouring to prove that the prisoner has committed similar offences with other people. Even if the counts in the present case could properly be tried together, the Judge was wrong in omitting to direct the jury that each count must be considered separately and that the uncorroborated witness could not be corroborated by another uncorroborated witness. Further, he failed to direct the jury on what matters, if any, were capable of being regarded as corroboration.

H. U. Willink, K.C., *E. A. Hawke* and *N. J. Skelhorn*, for the Crown:

Section 5 (3) of the Indictments Act, 1915, which gives the Court power to order separate trials where it is of opinion that the prisoner may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, contemplates something more in the nature of prejudice or embarrassment than the difficulty of having to face more than one charge. The test is whether the trial together of a number of counts may give the Judge

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a task which he may not be able to fulfil adequately when he comes to direct the jury. In NORMAN, 11 Cr. App. R. 58; [1915] 1 K. B. 341, the Court of Criminal Appeal held that the prisoner should not have been tried on all counts in the indictment together not merely because of the multiplicity of counts, but because there was a risk that he might have been embarrassed by the complexity of the charges. There is no authority for the proposition that in a case of the nature of the present case the mere trial of several counts together constitutes prejudice or embarrassment within the meaning of section 5 (3). The question whether to order separate trials or not is one for the discretion of the trial Judge, and provided that he has exercised such discretion judicially the Court of Criminal Appeal will not interfere: GIBBINS AND PROCTOR (1918), 13 Cr. App. R. 134.

[THE LORD CHIEF JUSTICE: This Court has recently upheld that view in GRONDKOWSKI AND ANOTHER (1946), 31 Cr. App. R. 116; [1946] K. B. 369.]

Further, the statute must have contemplated that trials on more than one count might take place which would lead to evidence not otherwise admissible being admitted. It is the duty of the Judge to direct the jury on keeping the issues separate. In SOUTHERN (1930), 22 Cr. App. R. 6, the law was stated too favourably to the defence, and the principle should not be extended beyond what was laid down in BAILEY, 18 Cr. App. R. 42; [1924] 2 K. B. 300. Where there is no real danger of confusion, it is proper to try together several counts charging offences of a similar nature, as the Judge can direct the jury to consider them separately. This was done by the Judge in the present case. Further, it was not necessary for the Judge to review all the evidence, or to say what was and what was not capable of being regarded as corroboration. The Judge's direction on this aspect of the case was in the circumstances sufficient. [He referred to FARID (1945), 30 Cr. App. R. 168.]

J. D. Casswell, K.C., replied.

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At the conclusion of the arguments the Court announced that the appeal would be dismissed and that they would give their reasons at a later date.

Cur. adv. vult.

May 13.—The following judgment was read.

THE LORD CHIEF JUSTICE: The judgment I am about to read was largely prepared by Denning, J.

George Sims was charged on an indictment containing ten counts. Three alleged buggery with three different men. Three alleged, as an alternative, gross indecency with the same three men. One alleged gross indecency with a fourth man. The remaining three counts alleged indecent assaults on three boys. The accused by his counsel applied for separate trials in respect of each separate man or boy involved. The Judge refused that application so far as the charges against the four men were concerned and they were tried together. The jury found the accused guilty of buggery with each of the three men, but acquitted him of gross indecency with the fourth man. He was sentenced to penal servitude for five years. This Court has already dismissed the appeal and now proceed to give their reasons for so doing.

The important point involved in this appeal is whether the Judge ought to have ordered separate trials in respect of each man involved. There is no doubt that the counts were properly included in one indictment, because by rule 3 of the rules under the Indictments Act, 1915, "charges for any offences, whether felonies or misdemeanours, may be joined in the same indictment if those charges are founded on the same facts or form or are part of a series of offences of the same or a similar character". The joinder in one indictment does not, however, decide the point, because section 5 (3) of the Indictments Act, 1915, provides that "Where, before trial, or at any stage of a trial, the Court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is

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desirable to direct that the person should be tried separately for any one or more offences charged in an indictment, the Court may order a separate trial of any count or counts of such indictment". That section confers a discretion on the Judge with which this Court will not interfere unless it sees that justice has not been done: see GRONDKOWSKI AND ANOTHER (1946), 31 Cr. App. R. 116; [1946] K. B. 369.

The appellant here says that justice has not been done because on a trial of the accused on the counts in respect of one man, evidence of offences in respect of the other men would not be admissible, and that the accused was therefore improperly prejudiced by the joint trial. We agree with the contention to this extent, that if such evidence was not admissible, the accused would be prejudiced in his defence and it would be desirable to direct separate trials. We do not think that the mere fact that evidence is admissible on one count and inadmissible on another is by itself a ground for separate trials, because often the matter can be made clear in the summing-up without prejudice to the accused. In such a case as the present, however, it is asking too much to expect any jury, when considering one charge, to disregard the evidence on the others, and if such evidence is inadmissible, the prejudice created by it would be improper and would be too great for any direction to overcome. It was for reasons of this kind that before the Act of 1915 the Court would order separate trials of separate counts for misdemeanours: see CASTRO (1883), 6 App. Cas. 229, at pp. 244–5, and NORMAN, 11 Cr. App. R. 58; [1915] 1 K. B. 341, at p. 343; and since the Act the same principles apply in this respect to felonies as to misdemeanours, cf. SOUTHERN (1930), 22 Cr. App. R. 6, at p. 9.

The question, therefore, is whether the evidence was admissible. There are observations of this Court each way and we have felt it necessary, therefore, to consider the matter afresh. Much depends on the proper approach. We start with the general principle that evidence is admissible if it is logically probative, that is, if it is logically relevant to the issue whether

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the prisoner has committed the act charged. To this principle there are exceptions. One of the most important exceptions is this: Evidence that the accused has a bad reputation or has a bad disposition is not admissible unless he himself opens the door to it by giving evidence of good character or otherwise under the Criminal Evidence Act, 1898. The reason for excluding evidence of bad character was said by Willes, J., to be policy and humanity. He thought that evidence of bad character was just as relevant as evidence of good character, but the unfair prejudice created by it was so great that more injustice would be done by admitting it than by excluding it, see ROWTON (1865), L. & C. 520 at pp. 540-1. Lord Sumner, however, thought it was irrelevant, see THOMPSON, 18 Cr. App. R. 61, at p. 78; [1918] A. C. 221, at p. 232. We do not stay to consider which view is correct. The exception is well settled. The question is what are its limits. In our opinion it does not extend further than the interests of justice demand. Evidence is not to be excluded merely because it tends to show the accused to be of a bad disposition, but only if it shows nothing more. There are many cases where evidence of specific acts or circumstances connecting the accused with specific features of the crime has been held admissible, even though it also tends to show him to be of bad disposition. The most familiar example is when there is an issue whether the act of the accused was designed or accidental or done with guilty knowledge, in which case evidence is admissible of a series of similar acts by the accused on other occasions, because a series of acts with the self-same characteristics is unlikely to be produced by accident or inadvertence, see MAKIN *v.* ATT.-GEN. FOR NEW SOUTH WALES, [1894] A. C. 57, at p. 65. Another example is where there is an issue as to the nature of an act done by the accused with or to another person, in which case evidence is admissible of a series of similar acts between them, because human nature has a propensity to repetition and a series of acts are likely to bear the same characteristics, see BALL, 6 Cr. App. R. 32; [1911] A. C. 47. So also where there is an issue as

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to the identity of the accused, we think that evidence is admissible of a series of similar acts done by him to other persons, because, while one witness to one act might be mistaken in identifying him, it is unlikely that a number of witnesses identifying the same person in relation to a series of acts with the selfsame characteristics would all be mistaken. In all these cases the evidence of other acts may tend to show the accused to be of bad disposition, but it also shows something more. The other acts have specific features connecting him with the crime charged and are on that account admissible. A similar distinction exists in respect of articles found in the possession of the accused. If they have no connection with the crime except to show that the accused has a bad disposition, the evidence is not admissible; but if there are any circumstances in the crime tending to show a specific connection between it and the articles, the evidence is admissible, see THOMPSON, 13 Cr. App. R. 61, at p. 80; [1918] A. C. 221, at p. 236 per Lord Sumner. Thus, in the case of burglary, evidence is admissible that housebreaking implements such as might have been used in the crime were found in the possession of the accused. In the case of abortion, evidence is admissible that the apparatus of an abortionist such as might have been used in the crime was found in the possession of the accused. The admissibility does not, however, depend on the circumstance that the articles might have been used in the crime. If there is any other specific feature connecting the articles with the crime, it will suffice. Thus, in THOMPSON (*supra*) there was no suggestion that the photographs were used in the crime charged, but the House of Lords found a connection between the crime and the photographs in that the criminal on the 16th showed a propensity to unnatural practices by making an appointment for the 19th and the accused showed a like propensity by the photographs found in his possession. In the case of TWISS, 13 Cr. App. R. 177; [1918] 2 K. B. 853, and GILLINGHAM (1939), 27 Cr. App. R. 143, there was also no suggestion that the photographs were used in the crime charged, but the

Court found a connection between the two in that the crime itself showed a propensity to unnatural practices and the photographs showed a like propensity. The specific feature in such cases lies in the abnormal and perverted propensity which stamps the individual as clearly as if he were marked by a physical deformity. We think that in all the cases where evidence has been admitted there have been specific features connecting the evidence with the crime charged as distinct from evidence that the accused is of a bad disposition. This is illustrated by the cases on false pretences where evidence can be given of other transactions when similar false pretences were used, because they have that specific feature in common; but not of different transactions which only show that the accused was of a generally fraudulent disposition.

It has often been said that the admissibility of evidence of this kind depends on the nature of the defence raised by the accused—see, for instance, the observations of Lord Sumner in THOMPSON, 13 Cr. App. R. 61, at p. 78; [1918] A. C. 221, at p. 232, and of this Court in COLE (1941), 28 Cr. App. R. 43. We think that that view is the result of a different approach to the subject. If one starts with the assumption that all evidence tending to show a disposition towards a particular crime must be excluded unless justified, then the justification of evidence of this kind is that it tends to rebut a defence otherwise open to the accused; but if one starts with the general proposition that all evidence that is logically probative is admissible unless excluded, then evidence of this kind does not have to seek a justification but is admissible irrespective of the issues raised by the defence, and this, we think, is the correct view. It is plainly the sensible view. It is only fair to the prosecution, because the depositions have often to be taken and the evidence called before the nature of the defence is known. It is also only fair to the accused, so that he should have notice beforehand of the case he has to meet. In any event, whenever there is a plea of not guilty, everything is in issue and the prosecution have to prove the

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whole of their case, including the identity of the accused, the nature of the act and the existence of any necessary knowledge or intent. The accused should not be able, by confining himself at the trial to one issue, to exclude evidence that would be admissible and fatal if he ran two defences; for that would make the astuteness of the accused or his advisers prevail over the interests of justice. An attempt was made by the defence in ARMSTRONG, 16 Cr. App. R. 149, at p. 157; [1922] 2 K. B. 555, at p. 565, to exclude evidence in that way, but it did not succeed.

Applying these principles, we are of opinion that on the trial of one of the counts in this case the evidence on the others would be admissible. The evidence of each man was that the accused invited him into the house and there committed the acts charged. The acts they describe bear a striking similarity. That is a special feature sufficient in itself to justify the admissibility of the evidence; but we think it should be put on a broader basis. Sodomy is a crime in a special category because, as Lord Sumner said, "persons who commit the offences now under consideration seek the habitual gratification of a particular perverted lust which not only takes them out of the class of ordinary men gone wrong, but stamps them with the hall-mark of a specialised and extraordinary class as much as if they carried on their bodies some physical peculiarity", see THOMPSON, 13 Cr. App. R., at p. 80; [1918] A. C., at p. 285. On this account, in regard to this crime we think that the repetition of the acts is itself a specific feature connecting the accused with the crime and that evidence of this kind is admissible to show the nature of the act done by the accused. The probative force of all the acts together is much greater than one alone; for, whereas the jury might think one man might be telling an untruth, three or four are hardly likely to tell the same untruth unless they were conspiring together. If there is nothing to suggest a conspiracy, their evidence would seem to be overwhelming. Whilst it would no doubt be in the interests of the prisoner that each case should be considered separately without the

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evidence on the others, we think that the interests of justice require that on each case the evidence on the others should be considered, and that even apart from the defence raised by him, the evidence would be admissible. In this case the matter can be put in another and very simple way; the visits of the men to the prisoner's house were either for a guilty or an innocent purpose; that they all speak to the commission of the same class of acts upon them tends to show that in each case the visits were for the former and not the latter purpose. The same considerations would apply to a case where a man is charged with a series of indecent offences against children, whether boys or girls; that they all complain of the same sort of conduct shows that the interest the prisoner was taking in them was not of a paternal or friendly nature but for the purpose of satisfying lust. If we are right in thinking that the evidence was admissible, it is plain that the accused would not be prejudiced or embarrassed by reason of all the counts being tried together, and there was no reason for the Judge to direct the jury that, in considering whether a particular charge was proved, they were to shut out other charges from their minds.

So much for the matter on principle. We must now turn to four particular authorities. The first is COLE (Russell on *Crimes*, 9th ed. 653), which was decided in Michaelmas Term, 1810. It has never been reported, but it has frequently been cited in the text books for the proposition that "it is not allowable to show, on the trial of an indictment, that the prisoner has a general disposition to commit the same kind of offence as that for which he stands indicted. Thus, in a prosecution for an infamous crime, an admission by the prisoner that he had committed such an offence at another time, and with another person, and that he has a tendency to such practices ought not to be received in evidence", see Phillips & Arnold on *Evidence*, 10th ed., p. 508; Russell on *Crimes*, 9th ed., p. 653; Stephens on *Evidence*, Art. 10. We have found a note of the case, however, in the *Judges' Note Books on Crown Cases*. The note shows that Cole was tried on three indictments for

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sodomy on three boys. Each indictment was presumably tried separately. On the trial of Cole for sodomy on James Mcfier, evidence was given by John Cathie, the father of another boy, that he arrested Cole and that on arrest Cole in effect admitted that he had committed sodomy with Cathie's son and said that sodomy was his natural inclination. Cole was found guilty, but the Judges were of opinion that the conviction was wrong on account of receiving Cathie's evidence. We in no way dissent from that decision, as in accordance with the practice then prevailing there were separate indictments in respect of each boy and the prisoner was being tried on one only. Even in 1810 the charges might have been included as three separate counts in the same indictment, but, being charges of felony, the prosecution would have been called on to elect on which they would proceed and so the counts would in effect become separated, see CASTRO (1883), 6 App. Cas. 229, at p. 244. Hence the usual practice was to include only one felony in each indictment. Nowadays, however, the charges would, as a matter of course, be included in one indictment. Moreover, the law as to giving evidence of other offences was not developed in the year 1810. In the third place, if the three counts had been tried together, there could have been no possible objection to the evidence of what Cole had said on his arrest. His admission that he had a natural inclination to sodomy would be clearly admissible.

Only nine years later the Judges met to consider EGERTON (1819), R. & R. 375. Egerton was indicted for robbery of a man of his coat by threatening to accuse the prosecutor of an unnatural offence. On the trial evidence was tendered that on the next evening Egerton made an attempt to obtain money from the prosecutor by similar threats. Holroyd, J., admitted the evidence "on the ground of its being confirmatory of the truth of the prosecutor's evidence as to the transactions of the former day, and as to the nature of those transactions". He reserved the case for the opinion of the Judges, who held him to have been right. The two offences

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had specific features in common and the evidence would without hesitation be held admissible to-day. The fact that the admissibility was reserved for the opinion of the Judges shows that the law was then only in process of development.

The second case is AILES (1918), 13 Cr. App. R. 173. There the indictment against Ailes contained three counts, two for indecent assault on a girl named Day, aged ten, and the third for indecent assault on another girl named Broomfield, aged twelve. In all three cases it was alleged that Ailes committed the assault in a cinema where he was an attendant. The two counts in respect of the girl Day were tried together, separately from the count in respect of the girl Broomfield. At the trial in respect of Day, the girl Broomfield was called to give evidence of the assault on her. The Court, which consisted of Darling, Rowlatt and Shearman, JJ., said that the girl Broomfield " was called quite rightly, to show that Ailes was a man with distorted sexual passions and that he was addicted to such acts of indecency ". The Court were so clearly convinced of this that they did not grant Ailes leave to appeal. In addition, the Court indicated that a better course would have been to have tried all three counts together. That case fully supports the views we have expressed earlier in this judgment, and is to be noticed because it places offences with young girls on the same footing as unnatural offences with men or boys.

The third case is BAILEY, 18 Cr. App. R. 42; [1924] 2 K. B. 300. In that case Bailey was charged on an indictment containing nineteen counts, sixteen for indecent assaults on sixteen different boys and three for gross indecency with three of the boys. The case was tried before Rowlatt, J. The charges were all tried together. On one of the counts no evidence at all was given as the boy was so frightened that he could not give evidence, but this seems to have been overlooked at the trial. The jury returned a general verdict of guilty on all counts for indecent assault and acquitted on the charges of gross indecency. The Court of Criminal Appeal quashed the conviction on the ground that the verdict should

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have been taken separately on each count and that the general verdict could not in the circumstances be upheld. Thus far the decision calls for no comment and does not affect the present discussion; but the Court in the course of its judgment said that if counsel for the defence had objected to the cases being tried together, the objection might have been upheld, and that the Judge should have directed the jury not to supplement the evidence on any one charge by evidence on the other charges. We find ourselves unable to agree with those observations which were plainly *obiter*. We think that Rowlatt, J., was in substance following AILES (*supra*), to which he had been a party. He tried the cases together and allowed the evidence on each count to be supplemented by evidence in the others. The only mistake he made was in directing the jury to consider the case as a whole because that led to the general verdict. Each count should have been considered separately. Apparently AILES (*supra*) was not cited to the Court of Criminal Appeal in BAILEY (*supra*). If it had been, we doubt whether the observations would have been made.

The fourth case is SOUTHERN (1930), 22 Cr. App. R. 6. There the indictment against Southern contained two counts, one for gross indecency with a boy aged thirteen, on June 14, 1929, and the other for indecent assault on a little girl aged five, on November 2, 1929. The charges were tried together, but the Court of Criminal Appeal thought that if an application for separate trials had been made, it would probably have been granted. Talbot, J., said at p. 9: "[The offences] were not the same in law, nor were they in fact connected except by the circumstance that the same man was accused of both." On that footing the case is in accord with the principles we have stated. Where an indictment contains counts for indecent offences against both male and female persons, it would not ordinarily be right to try the counts together, but where the persons assaulted are children, the mere fact that one is a small boy and the other a little girl would not in our opinion make it improper to try both cases together

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because the facts would indicate perverted lust on the part of the prisoner. If the Court in SOUTHERN'S CASE (*supra*) intended to go the length of saying that because one count related to a little boy and another to a little girl separate trials should have been granted, we are not disposed to follow the decision.

In the result, we think that there is nothing in the authorities which compels us to hold in the present case that the counts should have been tried separately or that the jury should have been directed, when considering each charge, to disregard the evidence on the others.

That disposes of the two main points argued by Mr. Casswell in this appeal. Two other points raised deal with corroboration. We do not think that the evidence of the men can be considered as corroborating one another, because each may be said to be an accomplice in the act to which he speaks and his evidence is to be viewed with caution; but the Judge gave the jury ample warning as to acting on the evidence of an accomplice, and no objection can be taken to the summing-up on that account. In some passages of the summing-up, however, the Judge did use expressions which seemed to convey that it was for the jury to say whether there was corroboration or not. That, of course, is not the case. It is for the Judge to say whether a particular piece of evidence, if accepted, is capable of being corroboration, and then for the jury to act on it or not as they think right. No injustice has, however, been done on that account here, because there was ample corroboration on which the jury might act not only in the pots of vaseline found in the house of the accused, but also in the accused's own evidence. We see no reason for interfering with the verdict of the jury on that account.

In the result, therefore, we are of opinion that this appeal should be dismissed. *Appeal dismissed.*

Solicitors: Butt & Bowyer, agents for Rutter & Rutter, Wincanton, for appellant.

CIRCUIT CASE (MIDLAND CIRCUIT). NOTTINGHAMSHIRE SUMMER ASSIZES.

BEFORE

MR. JUSTICE CASSELS.

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21 *June.*

MIRIAM WHARMBY.
ALICE LINDLEY.
ALBERT WALTER DAWSON LINDLEY.

Indictment—Motion to Quash—Depositions—Irregular Method of Taking—Use by Justices' Clerk of Statements Taken by Police—Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 17—*Administration of Justice (Miscellaneous Provisions) Act*, 1933 (23 & 24 Geo. 5, c. 36), s. 2 (2).

Section 17 of the Indictable Offences Act, 1848, provides that justices, when any person shall appear before them charged with an indictable offence, shall take the statements of witnesses on oath or affirmation and shall "put the same into writing, and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same. . . ."

By the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 2 (2) ". . . no bill of indictment . . . shall be preferred unless either—(a) the person charged has been committed for trial for the offence; or (b) the bill is preferred by the direction or with the consent of a Judge of the High Court or pursuant to an order made under section 9 of the Perjury Act, 1911."

At the preliminary investigation into an indictable offence the justices' clerk had before him statements of the witnesses which had been taken by the police, and as the witnesses gave their evidence checked these statements and amended, deleted from or added to them accordingly. The statements in their amended form were then re-typed in another room, and these re-typed statements were, at the close of the whole of the evidence for the prosecution, read over to and signed by the respective witnesses and the justices.

Held, that the above method of taking depositions failed to comply with the requirements of section 17 of the Indictable Offences Act, 1848, that the committal for trial was, therefore, bad, and that the indictment must be quashed.

GEE AND OTHERS (25 Cr. App. R. 198; [1936] 2 K. B. 242), followed.

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Motion to quash indictment.

The defendants were indicted at the Nottinghamshire Assizes on June 21, 1946, before Cassels, J., on an indictment containing nine counts, charging the first two defendants with larceny and receiving stolen goods, and the third defendant with receiving stolen goods. All three defendants were also charged with offences under the Consumer Rationing (Consolidation) Order, 1945.

Evidence was given by the clerk to the Mansfield justices of the manner in which he took the depositions at the preliminary investigation. He said that the method had been adopted to save time on account of shortage of staff. He said that he had been supplied by the police with, and had before him, typed statements of the witnesses who were to be called by the prosecution. As each witness was examined by the prosecuting solicitor, he (the clerk) compared the evidence with the statement before him, and made pencil notes on the typed statements, altering, deleting from or adding to them as occasion required. (These statements with the clerk's pencil notes on them were produced.) The original statements as amended by the clerk were taken into another room and re-typed, and at the conclusion of the evidence for the prosecution the appropriate re-typed statement was read over to each witness in turn, who had the opportunity of correcting it, and the statement was then signed by the witness and the justices.

T. Tempest Dineen, for the defendant Wharmby, did not associate himself with the motion to quash the indictment.

Francis Lee, for the other defendants:

The method of taking the depositions was irregular, in that it did not comply with section 17 of the Indictable Offences Act, 1848, because the evidence of the witnesses was

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not "put into writing" by the clerk, as is required by the section. The case is on all fours with GEE AND OTHERS (25 Cr. App. R. 198; [1936] 2 K. B. 242), where a similar procedure was adopted in the magistrates' Court and the conviction was quashed on appeal. Secondly, each deposition should have been read over to the particular witness immediately after each had concluded his or her evidence, and not after an interval of some hours, when the evidence could not be expected to be so fresh in the witness's memory. Thirdly, inasmuch as justice must not only be done, but also be seen to be done, it was wrong in principle that the justices' clerk should be associated with the prosecution to the extent of being supplied by the police with the statements which they had taken from persons who were to be called as witnesses. There was, therefore, no valid committal within the meaning of section 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, and the indictment should be quashed.

T. R. Fitzwalter Butler, for the Crown:

It is conceded that if there was a failure to comply with section 17 of the Indictable Offences Act, 1848, the indictment must be quashed. The procedure adopted in the magistrates' Court was certainly undesirable, but was not quite the same as that which appears to have been adopted in GEE AND OTHERS (*supra*). It appears from the report of that case that nothing at all was taken down in writing by the justices' clerk, while here it is manifest from the notes which have been produced that quite a substantial portion of the evidence of some of the witnesses, at any rate, was taken down in writing by the clerk, and it is submitted that there was just sufficient putting of the statements of the witnesses into writing by the clerk to comply with the section.

CASSELS, J.: In this case the three prisoners who are before the Court have had lodged in this Court against them an indictment containing nine counts, alleging against two of them the stealing of a very large quantity of table cloths and

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linen running into many thousands of pounds in value, and against two of them the receiving of the same knowing the goods to have been stolen, and against all of them various offences arising out of the acquiring and supplying of rationed goods without coupons. A very unfortunate state of affairs has arisen by reason of the fact that the depositions taken before the justices in the preliminary investigation of this case were irregularly taken and that there was a non-compliance with the requirements of section 17 of the Indictable Offences Act, 1848.

What happened upon that occasion—and one can only trust that it will not happen again in this or any other district—was that the statements which had been taken from the various witnesses by the police officer investigating the case were supplied to the clerk to the justices for the purpose of assisting him in the taking of the depositions. He made use of those typewritten statements in this way: he checked them as the evidence was being given, and amended them, added to them or took away from them as the questions were put to the various witnesses by the solicitor appearing for the prosecution. When each witness had finished his or her statement as taken by the clerk to the justices, or amended, or added to, or taken from, this document was removed from the Court and passed into the possession of another clerk who typed out another document, which document purported to represent the deposition of the witness. When all the witnesses had given their evidence in that way, some three hours after the first witness had given evidence, and a less time after each of the others who had followed her, the respective document as it had been transcribed by the clerk to the clerk to the justices was read to each witness, and then the witness was requested to sign what purported to be his or her deposition.

The requirements of section 17 of the Act of 1848 are that the justice or justices—who of course act through their clerk—shall take a statement on oath or affirmation from all those who shall know the facts and circumstances of the case,

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" and shall put the same into writing, and such depositions shall be read over to them and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same ". My view is that it is contrary to the spirit of that Act that depositions of witnesses in indictable offences should be taken in this way, and I am unable to accept the evidence of the clerk to the justices that this practice has been brought about by a shortage of staff, or that this represents a saving of time. I am at a loss to understand why so simple a method as is observed, certainly in the Metropolitan Magistrates' Courts and in many others, should not have been observed in this case. It seems to be a very simple thing to listen to the evidence as it is given by a witness, to make a record of it in narrative form in ordinary handwriting, and to read it over when the witness has finished his or her evidence, and then invite the witness to sign it. That practice has many advantages and makes for accuracy, whereas the system adopted in this case is calculated easily to lead to error. Under the system as generally adopted, what is duly recorded is what the witness is actually saying at that very moment, not something that he or she may have said to some police officer at some other stage; and further, immediately the evidence of a particular witness is finished it is read over to the witness, so that what has been said is fresh in the mind of the witness, and he or she is in a position at once to correct it. If there is a delay of three hours or more after the witness has concluded his evidence and the witness is then invited to correct, not a contemporaneously written statement of what he has said, but something which is a mixture of some previous statement amended, or added to, or subtracted from, the witness may hesitate a long time about altering it or saying that he has not said that which is there recorded.

That being so, these depositions have not been taken, in my view, satisfactorily, and the result is that these prisoners are not properly before this Court. They cannot

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be arraigned upon this indictment because there has been no proper committal. GEE AND OTHERS (25 Cr. App. R. 198; [1936] 2 K. B. 242) was very nearly on all fours with the position which arises here, and in that case, where there had been an actual trial and conviction, the conviction was quashed.

I feel, therefore, that the only thing that can be done in this case is to quash this indictment, and the prosecution must be left to take such steps as they may see fit to take. I think it is very regrettable indeed, because if the case re-starts it will involve the expenditure of more money, and whether it re-starts or not, the amount of money which has already been spent upon it has been thrown away.

Indictment quashed.

Solicitors: Marchant & Co., Mansfield, for the first defendant; Chambers and Newstead, Nottingham, for the second and third defendants; Hopkin & Co., Mansfield, for the prosecution.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE HENN COLLINS.

WILLIAM HENRY LAWRENCE.

1946.
22 *July.*

Sentence—Increase—Inveterate Offender not Charged as Habitual Criminal—Term of Penal Servitude Increased with View to Last Part being Served as Preventive Detention.

Increase of sentence of penal servitude in the case of an inveterate offender who was not charged with being a habitual criminal, with request to the Home Secretary to treat the last part of the term as a sentence of preventive detention.

Appeal against sentence.

The appellant pleaded guilty at East Kent Quarter Sessions on June 24, 1946, to larceny, and asked for eighteen

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other offences to be taken into consideration, and was sentenced by the Chairman to concurrent terms of three years' penal servitude.

No counsel appeared on either side.

THE LORD CHIEF JUSTICE: This is one of the most remarkable cases which has come before this Court for some time, and in many respects it is a perfectly shocking case. The appellant pleaded guilty at East Kent Quarter Sessions to three larcenies and asked for eighteen other offences to be taken into consideration. He is evidently a very plausible rogue. His *modus operandi* was as follows. He had cards printed in the name of a firm, consisting of his own name and that of some other person, the firm being described as watch repairers. He then went round to various houses in Margate, occupied by people in a somewhat humble walk of life, and asked the occupiers if they had watches in need of repair. Everybody knows the difficulty of getting watches and clocks repaired nowadays, and by means of plausible statements he got watches from these persons, and as soon as he got them took them off and sold them. He is not a clock repairer and knows nothing about clocks, but at one house he was given the job of repairing clocks, and after tinkering with them, told the occupiers that he had put all the clocks right and that they should not be wound for a number of hours, and he stole a quantity of property from the house. For these offences, twenty-one in all, he was sentenced to three years' penal servitude.

His record is one of the most deplorable that I have seen, and shows that society is not safe while he is at large. He is forty-three years of age. At one time he was in the Guards, where he had a good character. He then became a waiter or a chef. His first conviction was in 1929, when he was sentenced to three months' imprisonment for obtaining property by false pretences. In 1934 seventy-five frauds were dealt with, and he was sentenced to three years' penal servitude.

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After some other convictions, in 1939 he again received three years' penal servitude for five frauds. In August, 1942, he committed eighteen other frauds, and for those he received three years' penal servitude. He was released on June 19, 1945, with a remanet of 480 days and lived at his mother's chicken farm until October. Then started the present series of offences.

It is perfectly clear that the appellant is a public menace, and that the property of the public, especially the humbler members of the public, is not safe while he is at large. The appellant has been sentenced to three years' penal servitude. Considering that he has been sentenced to three years' penal servitude on three previous occasions, it is very difficult to understand why the Court of Quarter Sessions passed so light a sentence upon him. He is a habitual criminal, and it would have been a proper case in which to indict him as a habitual criminal, and this Court is going to take the step of regarding him as a habitual criminal. We cannot order a conviction of being a habitual criminal, but we can deal with him as though he were one and ask the Home Secretary to have him treated in prison as though he were one. Punishment is not the object in a case of this sort. The appellant has sent whining appeals to the Court to show that punishment is no use in his case. What is necessary is that the public should be protected against him, and if he had been dealt with as a habitual criminal, he would have served the sentence passed on him as a habitual criminal in preventive detention, which is less rigorous than penal servitude, but prevents the commission of a further offence.

The Court will, therefore, ask the Home Secretary to treat the last part of the sentence which they have decided to substitute for that passed at Quarter Sessions as though the appellant had been sentenced as a habitual criminal. Three years' penal servitude is wholly inadequate as a sentence for a habitual criminal, and the Court orders that there be substituted a sentence of three years' penal servitude on the first count of the indictment, and five years' penal servitude

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on the second count to run consecutively, making eight years in all, and they will ask the Home Secretary to treat the last five years as though it were a sentence of five years' preventive detention following on a sentence of three years' penal servitude.

Sentence increased.

By s. 12 of the Prevention of Crime Act, 1908: "Where a person has been sentenced, whether before or after the passing of this Act, to penal servitude for a term of five years or upwards, and he appears to the Secretary of State to have been a habitual criminal within the meaning of this Act, the Secretary of State may, if he thinks fit, at any time after three years of the term of penal servitude have expired, commute the whole or any part of the residue of the sentence to a sentence of preventive detention, so, however, that the total term of the sentence when so commuted shall not exceed the term of penal servitude originally awarded."

INCREASES OF SENTENCE.

The Court increased sentences passed on appellants in the following cases:—

On May 13, WILLIAMSON HENDERSON, sentenced at Winchester City Quarter Sessions to three years' penal servitude for larceny, sentence increased to five years' penal servitude.

On June 3, JOHN DEVINE, sentenced at Manchester City Quarter Sessions to three years' penal servitude for housebreaking and larceny, sentence increased to five years' penal servitude.

On July 8, ERIC HARDY NELSON, sentenced at Salford Hundred Quarter Sessions to three years' penal servitude for receiving stolen property, sentence increased to five years' penal servitude.

Increases of Sentence

On July 15, Frank Arthur Stanley, sentenced at the Central Criminal Court to three years' penal servitude for housebreaking and five years' preventive detention as a habitual criminal, sentence of preventive detention increased to seven years.

On July 22, Roland George Saunders, sentenced at Cardiff City Sessions to three years' penal servitude for shop-breaking and garage-breaking, sentence increased to five years' penal servitude.

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